A

MANUAL

OF THE

LAW OF MARITIME WARFARE

EMBODYING

THE DECISIONS

OF LORD STOWELL AND OTHER ENGLISH JUDGES,
AND OF THE AMERICAN COURTS,

AND

THE OPINIONS OF THE MOST EMINENT JURISTS:

WITH

AN APPENDIX

OF

THE OFFICIAL DOCUMENTS AND CORRESPONDENCE
IN RELATION TO THE PRESENT WAR.

BY

WILLIAM HAZLITT & HENRY PHILIP ROCHE,
OF THE MIDDLE TEMPLE AND LINCOLN'S INN, ESQRS.
BARRISTERS-AT-LAW.

[*The Authors reserve the right of Translating this Work.*]

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"Those Judgments which render the Volume which records them not, like the Reports of Common Law Cases, a book only unsealed to the Members of the Legal Profession, but one which may well be in the hands of the general Student, and form part of any Classical library of English eloquence, or even of National History."—*Lord Brougham's Statesmen:* LORD STOWELL.

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TO

SIR RICHARD BETHELL, KNT., M.P.

HER MAJESTY'S SOLICITOR-GENERAL,

This Work

IS,

WITH PERMISSION, MOST RESPECTFULLY DEDICATED,

BY

THE COMPILERS.

PREFACE.

THE long period of peace with which it has pleased Divine Providence to bless this country having been unhappily terminated by the unjust aggressions of Russia, all questions connected with the conduct of War—the duties, obligations and liabilities of the officers of her Majesty's navy and of our commercial marine, affecting so intimately as they do the general interests of the nation as well as those of neutral powers—have assumed an importance comparatively unknown during the existence of the present generation. It has therefore been considered expedient to place before the public, professional as well as commercial, in a compendious form, those great and universally recognized principles of international jurisprudence in relation to Maritime Warfare which have received the authoritative sanction of Lord Stowell and other great Judges in our own country, and have been followed in an equal spirit of liberality and enlightenment by the Courts of the United States. It must be gratifying to the people of England, as well as to

the world in general, to find that the views of enlarged humanity, in reference to privateering and the protection of neutral commerce, which have so honourably and consistently distinguished the Government of the United States, have been, we may say, recognized as a rule of the present War by her Majesty and her ally his Majesty the Emperor of the French.

The Compilers feel great pleasure in acknowledging the valuable assistance which they have derived in the execution of their task from the decisions of the American Courts,—now first collected in any English treatise,—from the able writings of Mr. Chancellor Kent and Dr. Wheaton, and from the complete and lucid exposition of "The Law relating to Officers of the Navy," by Mr. Harris Prendergast of the Chancery Bar.

19, Old Square, Lincoln's Inn,
April 27th, 1854.

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THE LAW
OF
MARITIME WAR.

WAR.

WAR, says Vattel, is that state in which we prosecute our right by force. We also understand, by this term, the act itself, or the manner of prosecuting our right by force: but it is more conformable to general usage, to understand this term in the sense we have annexed to it. "War," to use the language of Lord Bacon (Works, iii. 40), "is one of the highest trials of right; for, as princes and states acknowledge no superior upon earth, they put themselves upon the justice of God by an appeal to arms.

"War," says Mr. Manning, in his Commentaries on the Law of Nations, p. 98, "is the state of nations among whom there is an interruption of all pacific relations, and a general contention by force, authorized by the Sovereign."

As nature, continues Vattel, has given men no right to employ force, unless when it becomes necessary for self-defence and the preservation of their rights, the inference is manifest, that, since the establishment of political societies, a right, so dangerous in its exercise, no longer remains with private persons, except in those encounters where society cannot protect or defend them. In the bosom of society, the public authority

decides all the disputes of the citizen, represses violence, and checks every attempt to do ourselves justice with our own hands. If a private person intends to prosecute his right against the subject of a foreign power, he may apply to the sovereign of his adversary, or to the magistrates invested with the public authority: and if he is denied justice by them, he must have recourse to his own sovereign, who is obliged to protect him. It would be too dangerous to allow every citizen the liberty of doing himself justice against foreigners; as, in that case, there would not be a single member of the state who might not involve it in war. A right of so momentous a nature,—the right of judging whether the nation has real grounds of complaint,—whether she is authorized to employ force, and justifiable in taking up arms,—whether prudence will admit of such a step,—and whether the welfare of the state requires it,—that right can belong only to the body of the nation, or to the sovereign, her representative. It is doubtless one of those rights, without which there can be no salutary government, and which are therefore called rights of Majesty.

War is either defensive or offensive. He who takes up arms to repel the attack of an enemy, carries on a defensive war. He, who is foremost in taking up arms, and attacks a nation that lived in peace with him, wages offensive war. The object of a defensive war is very simple: it is no other than self-defence. In that of offensive war, there is as great a variety as in the multifarious concerns of nations; but in general, it relates either to the prosecution of some rights, or to safety. We attack a nation with a view either to obtain something to which we lay claim, to punish her

for an injury she has done us, or to prevent one which she is preparing to do, and thus avert a danger with which she seems to threaten us.

The sovereign, then, is the real author of war, which is carried on in his name, and by his order. The troops, officers, soldiers, and, in general, all those by whose agency the sovereign makes war, are only instruments in his hands. They execute his will and not their own. The arms and all the apparatus of whatever is peculiarly used in waging war, is to be classed among the instruments of war; and things which are equally used at all times, such as provisions, belong to peace, unless it be in certain particular junctures, when those things appear to be specially destined for the support of war. Arms of all kinds, artillery, gunpowder, saltpetre, and sulphur, of which it is composed, ladders, gabions, tools, and all other implements for sieges, materials for building ships of war, tents, soldiers' clothes, &c., these always belong to war. As war cannot be carried on without soldiers, it is evident that whoever has the right of making war, has also naturally that of raising troops. The latter, therefore, belongs likewise to the sovereign, and is one of the prerogatives of majesty.

The power of levying troops, or raising an army, is of too great consequence in a state to be intrusted to any other than the sovereign. The subordinate authorities are not invested with it; they exercise it by order or commission from the sovereign. But it is not always necessary that they should have an express order for the purpose. On those urgent exigencies which do not allow time to wait for the supreme order, the governor of a province, or the commandant of a town, may raise troops for the defence of the town or

province committed to their care; and this they do by virtue of the power tacitly given them by their commission in cases of this nature.

This leads us to a particular question nearly allied to the preceding. When a neighbour, in the midst of a profound peace, erects fortresses on our frontier, equips a fleet, augments his troops, assembles a powerful army, fills his magazines,—in a word, when he makes preparations of war, are we allowed to attack him with a view to prevent the danger with which we think ourselves threatened? The answer greatly depends on the manners and character of that neighbour. We must inquire into the reasons of those preparations, and bring him to an explanation; such is the mode of proceeding in Europe; and, if his sincerity be justly suspected, securities may be required of him. His refusal in this case would furnish ample indication of sinister designs, and a sufficient reason to justify us in anticipating them.

In order to be justifiable in taking up arms, it is necessary: first, that we have a just cause of complaint; second, that a reasonable satisfaction has been denied us; third, the ruler of the nation ought naturally to consider whether it be for the advantage of the state to prosecute his right by force of arms. But all this is not sufficient. As it is possible that the present fear of our arms may make an impression on the mind of our adversary, and induce him to do us justice, we owe this farther regard to humanity, and especially to the lives and peace of the subjects, to declare to that unjust nation, or its chief, that we are at length going to have recourse to the last remedy, and make use of open force for the purpose of bringing him to reason. This

is called declaring war. All this is included in the Roman manner of proceeding, regulated in their fecial law. They first sent their chief herald, called *pater patratus*, to demand satisfaction of the nation who had offended them; and, if within the space of thirty-three days that nation did not return a satisfactory answer, the herald called the gods to be witnesses of the injustice, and came away, saying that the Romans would consider what measures they should adopt. The king, and in aftertimes the consul, hereupon asked the senate's opinion; and when war was resolved on, the herald was sent back to the frontier, where he declared it." (Vattel, Book iii.)

Among the ancient Germans this power belonged to the popular assemblies (Tacitus, *De Moribus Germanorum*, cap. ii.), and the power was afterwards continued in the same channel, and actually resided in the Saxon Wittenagemote; but in the monarchies of Europe, which arose on the ruins of the feudal system, this important prerogative was generally assumed by the King, as appertaining to the executive department of government.

In the United States of America, the power of declaring war, as well as of raising the supplies, is wisely confided to the legislature of the Union. (Kent's Commentaries, i, 60.) During the middle ages, a previous declaration of war was held to be requisite by the laws of honour, chivalry, and religion; but in modern times the practice of a solemn declaration made to the enemy has fallen into disuse, and the nation contents itself with making a public declaration of war within its own territory, and to its own people. Grotius, indeed, considers a previous demand of satisfaction and a declaration, as requisite to a solemn

and lawful war; and Puffendorff holds acts of hostility, which have not been preceded by a formal declaration of war, to be no better than acts of piracy and robbery.—(Book viii. cap. 6, sect. 9.) Emerigon (*Traité des Assurances*, i. 563) is of the same opinion; and Vattel (Book iii. cap. 4, s. 51), strongly recommends a previous declaration of war, as being required by justice and humanity. Bynkershoeck (Quæstiones Jur. Publ. b. i. cap. 2) maintains that a declaration of war is not requisite by the law of nations, and that, though it may very properly be made, it cannot be required as a matter of international right, and cites many instances to show, that within the last two centuries wars have been frequently commenced without a previous declaration.

Since the time of Bynkershoeck, it has become settled by the practice of Europe, that war may lawfully exist by a declaration which is unilateral only, without a declaration on either side.

"War," says Lord Stowell, in *The Eliza Ann* (1 Dodson, 247), "may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only is not a mere challenge, to be accepted or refused at pleasure by the other. It proves the existence of actual hostilities on one side at least, and puts the other party also into a state of war, though he may, perhaps, think proper to act on the defensive only."

Again, in *The Nayade* (4 Rob. 252), Lord Stowell said:—"In order to legalize a war, it must not only be commenced or declared by one of the contesting states, but such commencement or declaration must be made by that particular branch of the state which is

invested by the constitution with this important prerogative." "If," says Brooke, in his Abridgement, tit. *Denizen*, "all the people of England would make war with the King of Denmark, and the King (that is our own King) will not consent to it, this is not war; but when the peace is broken by ambassadors the league is broken." Thus in the war declared by the United States against England, in 1812, hostilities were immediately commenced by the former power, as soon as the act of Congress was passed, without waiting to communicate to the English government any notice of the intention of war.

It is necessary for a nation to publish the declaration of war for the instruction and direction of her own subjects, in order to fix the date of the rights which belong to them, from the moment of this declaration, and in relation to certain effects which the voluntary law of nations attributes to a war in form. Without such a public declaration of war, it would, in a treaty of peace, be too difficult to determine those acts which are to be considered as the effects of war, and those that each nation may set down as injuries of which she means to demand reparation.

"A sovereign," says Vattel (ub. sup. 64), "is not only to make the declaration of war public within his dominions, for the information and direction of his subjects, but he is also to make known his declaration of war to the neutral powers, in order to acquaint them with the justificatory reasons which authorize it, the cause which obliges him to take up arms, and to notify to them that such or such a nation is his enemy, that they may conduct themselves accordingly. This publication of the war may be called *declaration*, and that

which is notified directly to the enemy *denunciation*; and, indeed, the Latin term is *denunciatio belli*. War is at present published and declared by manifestoes. These documents never fail to contain the justificatory reasons, good or bad, on which the party founds his right to take up arms. The manifesto, implying a declaration of war, or the declaration itself, printed, published and circulated throughout the whole state, contains also the sovereign's general orders to his subjects relative to their conduct in the war." With regard to the United States of America, war cannot lawfully be commenced without an act of Congress, and such act is, of course, a formal official notice to all the world, and equivalent to the most solemn declaration.

"When war is duly declared," says Chancellor Kent, (1—63) "it is not merely a war between this and the adverse government in their political characters. Every man is, in judgment of law, a party to the acts of his own government, and a war between the governments of two nations, is a war between all the individuals of the one, and all the individuals of which the other nation is composed. Government is the representative of the will of all the people, and acts for the whole society. This is the theory in all governments; and the best writers on the law of nations concur in the doctrine, that when the sovereign of a state declares war against another sovereign, it implies that the whole nation declares war, and that all the subjects of the one are enemies to all the subjects of the other." The inclinations of individuals, in relation to other states, are to be considered as bound by the acts of their government. This is a principle not lightly to be departed from; it may, indeed, admit of an ex-

ceptions under possible circumstances, but these must be manifested by very clear overt acts, and supported by very strong proof. (Lord Stowell, 1 Robinson, 118.)

The declaration of hostilities may operate with a retroactive force under special circumstances. Thus, in relation to *The Herstelder* and *The Dankebaar*, Dutch vessels seized before the declaration of hostilities with Holland, and subsequently condemned, Lord Stowell said (1 Rob. 116), "Though we speak of the declaration of hostilities as issued September 15th, 1795, it must be kept in mind that the state of Holland was very ambiguous for several months preceding. Subsequent events have retroactively determined that the character of Holland, during the whole of that doubtful state of affairs, is to be considered as hostile; and that the property of Dutch subjects seized under it, is to be treated as hostile; and although the declaration of hostilities has made this difference, that it gives the individual captors a right in the capture, instead of the Crown, that is a domestic regulation only."

"When hostilities have commenced, the first objects that naturally present themselves for detention and capture are the persons and property of the enemy, found within the territory on the breaking out of the war. According to strict authority (Grotius, b. 3, c. 9, s. 4, c. 21, s. 29; Bynk. c. 2 & 7, Martens, b. 8), a state has a right to deal as an enemy with personal property so found within its power, and to confiscate the property, and detain the persons as prisoners of war; but this right has been largely modified by various stipulations in treaties, which Emerigon considers an affirmance of common right or the public

law of Europe, and the general rule laid down by some of the later publicists is in conformity with this relaxation. (*Kent*, i. 63-4.)

"The sovereign declaring war," says Vattel (*ubi sup.* s. 63), "can neither detain the persons nor the property of those subjects of the enemy who are within his dominions at the time of the declaration. They came into his country under the public faith. By permitting them to enter and reside in his territories, he tacitly promised them full liberty and security for their return. He is, therefore, bound to allow them a reasonable time for withdrawing with their effects; and, if they stay beyond the time prescribed, he has a right to treat them as enemies,—as unarmed enemies, however. But if they are detained by an insurmountable impediment, as by sickness, he must necessarily, and for the same reasons grant them a sufficient extension of the term. At present, so far from being wanting in this duty, sovereigns carry their attention to humanity still further; so that foreigners, who are subjects of the state against which war is declared, are very frequently allowed full time for the settlement of their affairs. This is observed in a particular manner with regard to merchants." So long since as Magna Charta, it was provided that foreign merchants who were within the realm at the time of the commencement of the war—domiciled there—though attached, "without harm of body or goods until it be known how English merchants are treated by the enemy, shall be safe and well treated here, if our merchants are safe and well treated with them." So, the judges in the time of Henry the Eighth declared, that if a Frenchman came to England before the war, neither

his person nor his goods should be seized; and, again, the Statute of Staples (27 Edw. 3, c. 17) gave licence to foreign merchants residing is England when war commenced "to have convenient warning of forty days, by proclamation, to depart the realm with their goods; and if they could not do it within that time by reason of accident, they were to have forty days more to pass with their merchandize, and liberty in the mean time to sell the same." The United States of America, by Act of Congress (6th July, 1798, c. 73), adopted the same humane and enlightened policy. (*The Anne Green and Cargo*, 1 Gall. 292.) The Judges of the Supreme Court, in the case of *Brown* v. *The United States* (8 Cranch, 110), seem to have restored the ancient and sterner rule, so far as that country is concerned, (see also *The Emulous*, 1 Gall. 573). The principle upon which the British Government is prepared to act during the present war has been thus indicated by Lord Clarendon, who, in answer to a deputation of Russian merchants, on the 21st of March, 1854, stated "that the Government are disposed to respect the persons and property of all Russian subjects residing as merchants in this country to the full extent promised by the Emperor of Russia towards British subjects, and that all necessary measures will be adopted to enable them to remain unmolested in the quiet prosecution of their business."

Even "where the intervention of hostilities puts the property of the enemy in such a situation that confiscation may ensue, unless some step is taken for that purpose, unless there is some legal declaration of the forfeiture, the right of the owner revives on the return of peace. This is an acknowledged prin-

ciple in the Courts of Common Law, borrowed in all probability from the general law of nations." (Lord Stowell, in the *Nuestra Senora de los Dolores*, Edwards, 60.)

"On the breaking out of a war, the citizens of a country are not bound to return home from countries other than those of the enemy, unless by the order of their government. But as to citizens in a hostile country, the declaration of war imports suspension of all further commerce with such country, and obliges them to return, unless they would be involved in all the consequences of the hostile character." (*The Joseph*, 1 Gallison, 551.)

In the case of the present war with Russia, a term of six weeks was allotted by the Queen, within which her subjects, resident in Russia, were to return to England, and the following declaration was issued with respect to Russian vessels in English ports:—

"At the Court at Buckingham Palace, the 29th day of March, 1854,

"Present—The Queen's Most Excellent Majesty in Council.

"Her Majesty being compelled to declare war against his Imperial Majesty the Emperor of all the Russias, and being desirous to lessen as much as possible the evils thereof, is pleased, by and with the advice of her Privy Council, to order, and it is hereby ordered, that Russian merchant vessels, in any ports or places within her Majesty's dominions, shall be allowed until the 10th day of May next, six weeks from the date hereof, for loading their cargoes, and departing from such ports or places; and, that such Russian merchant vessels, if met at sea by any of her

Majesty's ships, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; provided, that nothing herein contained shall extend, or be taken to extend, to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian Government.

"And it is hereby further ordered by her Majesty, by and with the advice of her Privy Council as aforesaid, that any Russian merchant vessel which, prior to the date of this order, shall have sailed from any foreign port, bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

"And the Right Hon. the Lords Commissioners of her Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain.

"C. C. GREVILLE."

The French Government issued the following order on the same subject:—

"Art. 1. A delay of six weeks, dating from this day, is granted to Russian trading vessels to leave French ports. Consequently, Russian trading vessels actually in our ports, or those which, having left Russian ports before the declaration of war, shall

enter French ports, may enter and complete their cargoes up to the 9th of May inclusively.

"Art. 2. Such of these ships as should be captured by French cruisers, after having left the ports of the empire, shall be let free, if they can prove by their papers on board that they were making direct for their port of destination, and had not been yet able to reach it. (Signed) "DROUYN DE LHUYS."

"March 27, 1854."

ALIEN ENEMY.

An alien enemy is a person under the allegiance of the state at war with us. (Per Eyre, Ch. J. in *Sparenburgh* v. *Bannatyne*, 1 Bos. & Pul. 173.) A distinction has been taken between a permanent and a temporary alien enemy. A man is said to be permanently an alien enemy, when he owes a permanent allegiance to the state at war with us, his hostility being as permanent as his allegiance, beginning at the commencement of his country's quarrel, and concluding only with the termination of the dispute; but he, who does not owe a permanent allegiance to the state at war with us, though he be himself engaged in actual combat against our forces, is not to be deemed a permanent enemy, for his hostility endures no longer than his own individual interest or convenience may continue it. "A neutral," said Lord Chief Justice Eyre, "can be an alien enemy only with respect to what he is doing under a local or temporary allegiance to a power at war with us; when the allegiance determines, the character determines. He can have no

fixed character of alien enemy who owes no fixed allegiance to our enemy, and has ceased to be in hostility against us, it being only in respect of his being in a state of actual hostility, that he was, even for a time, an enemy at all."

A person who, by the intervention of war, has become an alien enemy, cannot, after the condemnation of his property in a Vice-Admiralty Court, prosecute an appeal in the High Court of Admiralty:— "It is an universal disability under which he labours, and which all courts are bound to notice. Whatever rights he might have possessed, pass to the crown. The officers of the crown might, if they had thought proper, have defended the claim; and, if they had succeeded in obtaining a reversal of the sentence, the king would have been entitled to the whole, instead of a proportion of the property. But, to the party himself, the Court can assign nothing, nor has it the power of attending to his claims in any manner. It is under an obligation of shutting its ears against his complaints. The cases which have been cited from Dallas, by Dr. Stoddart, (*States of Georgia* v. *Brailsford, &c.*) appear to be of a different kind. I have not had no opportunity of looking into them, but they appear to have been personal actions. It has not been much the practice in modern times, to proceed against the property of enemies found in the country; but, it is no where laid down as law, that an inquest of office might not now be had, and the property confiscated. I remember a proceeding to that effect in the American War: and there can be no doubt that the law remains perfectly the same as it was at that time. It is said, that I may suspend the present proceedings,

and give the party an opportunity of renewing his claim on the return of peace. But this is a greater privilege than an alien friend or any other person could demand from the Court. Such a suspension would be an act of injustice to the party in possession of the sentence. The principle has been so fixed in the Admiralty Courts, that even in cases of ransom, which were formerly in England legal contracts, and contracts arising out of the events of the war, the ransom could not be put in suit on the part of the enemy; proceedings were always carried on in the name of the hostage suing for his liberty. (Lord Stowell in *The Rebecca*, 5 Rob. 102.)

The general rule of the common law, however, is relaxed where the alien enemy is under the protection of the sovereign, as where he comes into the kingdom after the war by licence; or, being there at the time of the war, is permitted to continue his domicil; or, where the contract upon which suit is brought—upon wages for example, arises out of a trade licensed by the government. (*Crawford and Others* v. *The William Penn*, Peters Circ. C. R. 106; *The Charlotte*, Dodson, 212; *The Maria Theresa*, ib. 303; *The Vrow Maria*, ib. 234; *The Frederick*, ib. 266.)

HOSTILE CHARACTER.

But besides those persons who are alien enemies strictly so called, as actually bearing arms against one of the belligerent nations, or being liable to be called upon to bear arms against her by the obligation of their allegiance, we have to consider a hostile relation

of a much more complicated nature, the relation that exists between a belligerent nation, and that class of persons, who, though they be not, during a whole war, nor even at a particular period of it, enemies in the strict sense of the word, absolutely and in all respects, yet must be deemed alien enemies to certain intents and purposes of a commercial nature; so that their property may, for the most part, be taken as prize, according to the laws of war between adverse belligerents. Therefore, when we speak of an hostile character, it is to be understood to imply, not hostility to all intents and purposes, but only that degree of hostility which attaches to particular property, and which has been held to authorize the seizure of it.

The hostile character thus understood may be acquired in several ways. "It cannot be doubted," said Lord Stowell, in his judgment on *The Vrow Anna Catharina* (5 Rob. 161), "that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, or the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation, as a holder of the soil, and is to be taken as a part of that country in that particular transaction, independent of his own personal residence and occupation." So too in the case of *The Phœnix* (5 Rob. 21), Lord Stowell said: "Certainly nothing can be more decided and fixed, as the principle of this Court, and of the Supreme Court, upon every solemn argu-

ment there, that the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided both in this, and the Superior Court, that it is no longer open to discussion. No question can be made on the point of law at this day. First, then, it appears that the produce of the hostile soil is to be considered as bearing a hostile character; and, certainly, if any property ought to be considered as bearing such a character at all, for purposes of seizure, nothing can be more reasonable than that the tracts of the enemy's land, one of the greatest sources, and, as some have supposed, the sole source of national wealth, should be regarded as legitimate prize. That the interest of friends may sometimes be involved in our vengeance upon enemies, is a matter which it is natural to regret, but impossible to avoid. The administration of public rules admits of no private exceptions, and he, who clings to the profits of a hostile connection, must be content to bear its losses also. Secondly, it will be found that a settlement in a hostile jurisdiction, whether it be by residence, or merely by the maintenance of a commercial establishment, impresses on the person so settling the character of the enemies among whom he settles, in regard to such of his commercial transactions as are connected with that settlement." The reasonableness of this principle, says Chancellor Kent (i. 82), will be acceded to by all maritime nations; and it was particularly recognized as a valid doctrine by the Supreme Court of the United States in *Bentzon* v. *Boyle* (9 Cranch, 191).

The ship *President* (5 Rob. 277) was taken on a voyage from the Cape of Good Hope, then in possession of the Dutch, at war with us, to Europe, and claimed for Mr. J. Emslie, as a subject of America. It appeared that he had been a British-born subject, who had gone to the Cape during the preceding war, and had been employed as American Consul there. Lord Stowell said, "the Court must, I think, surrender every principle on which it has acted in considering the question of national character if it were to restore this vessel. The claimant is described to have been for many years settled at the Cape, with an established house of trade, and as a merchant of that place, and must be taken as a subject of the enemy's country."

There prevailed, indeed, in the earlier part of the last war, a very general misapprehension among the American merchants, that they were entitled to retain the entire privilege of the American character, notwithstanding a residence and occupation in any other country, a misapprehension which had to be corrected by a great number of decisions in our Courts. In *The Anna Catharina* (4 Rob. 107), a gentleman had been at first described as an American merchant, but upon further proof being required by the Court, he was described as a person having a house of trade, and actually living at Curaçoa, then a Dutch possession, "He is undoubtedly," said Lord Stowell, "to be considered as an enemy at the commencement of this transaction, Holland being, at that period of time, the enemy of this country."

In the case of *The Indian Chief* (3 Rob. 12), Lord Stowell said, "No position is more established than this, that if a person goes into another country, and

engages in trade, and resides there, he is, by the law of nations, to be considered as a member of that country."

In the case of *M'Connel* v. *Hector* (3 Bos. & Pul. 113), Lord Alvanley said, "While an Englishman resides in a hostile country, he is a subject of the country." So, in *De Laneville* v. *Phillips* (2 New Rep. 97), the Court, on discovering that the plaintiff was resident in an enemy's country, refused to afford her relief. Upon the same principle, a foreigner lawfully residing within the British dominions has been held to be, for various commercial purposes, a British subject. In the case of *The Indian Chief* (3 Rob. 12), a cargo, which belonged to Mr. Millar, an American Consul, resident at Calcutta, and which had been taken in trade with the enemy, was condemned as the property of a British merchant engaged in illegal commerce. "It is said to be hard," observed Lord Stowell, "that Mr. Millar should incur the disabilities of a British subject, at the same time that he receives no advantage from that character; but I cannot accede to that representation, because he is in the actual receipt of the benefit of protection for his person and commerce from British arms and British laws; under an existing British administration in the country, he may be subject to some limitations of commerce incident to such establishments, which would not occur in Europe, but he must take his situation with all its duties, and amongst those duties, the duty of not trading with the enemies of this country."

Chancellor Kent states (i. 83), that this principle—that, for all commercial purposes, the domicil of the party, without reference to the place of birth, becomes the test of national character—has been

repeatedly and explicitly admitted in the Courts of the United States; if he resides in a belligerent country, his property is liable to be captured as enemy's property; as if he resides in a neutral country, he enjoys all the privileges and is subject to all the inconveniences of the neutral trade. The general rule is, that a person living *bonâ fide* in a neutral country is fully entitled to carry on a trade to the same extent as the native merchants of the country in which he resides, provided it is not inconsistent with his native allegiance. (Lord Stowell, *The Emanuel*, 1 Rob. 296.) The same doctrine seems to have been decided, even beyond the reservation of native allegiance, in the case of *The Danous* (4 Rob. 255), which was determined before the Lords, 1802. In this case, a British born subject, resident at the English factory at Lisbon, was allowed the benefit of a Portuguese character, so far as to render his trade with Holland, (then at war with England, but not with Portugal,) not impeachable as an illegal trade. It is true, that in the case of *De Metton* v. *De Mello* (2 *East*, 234; 2 *Camp.* 420), Lord Ellenborough does not notice these decisions; but the observations of his Lordship in that case, particularly when coupled with the concluding part of his judgment, which advised that the plaintiff should go back to the Court of Admiralty, and have the matter set right there, appear to amount to nothing like a denial of the above doctrine. The same rule was afterwards applied to a natural born British subject domiciled in the United States, and it was held that he might lawfully trade to a country at war with England, but at peace with the United States. (*Bell* v. *Reid*, M. & S. 726.)

M-1273

DOMICIL.

A British born subject may, by his employment and residence in a foreign country, acquire a new national character for commercial purposes; but he cannot shake off his allegiance to his native country, or divest himself altogether of his British character by a voluntary transfer of himself to another country. For the mere purposes of trade, he may, indeed, transfer himself to another state, and may acquire a new national character. An English subject, resident in a neutral state, is at liberty to trade with the enemy of this country in all articles, with the exception of those which are of a contraband nature; but a trade in such articles would be contrary to his allegiance. (*The Ann*, Dodson, 222.)

As to the question what constitutes residence to hostile purpose, within the meaning of the laws of war, the intention of remaining, *animus manendi*, appears to be the chief point that must be determined by the tribunals. "I do not," said Lord Stowell, in *The Bernon* (1 Robinson, 102), "mean to lay down so harsh a rule as that two voyages from France should make a man a Frenchman; but the claimant appears to have had a continuous residence there during the interval of his voyages, and to have had that residence, also, with an intention of remaining." From the whole of that case, it appears that the intention of remaining, the *animus manendi*, is the chief point to be considered by the Court in determining what shall be deemed a residence."

"Of the few principles," says Lord Stowell, in *The*

Harmony (2 Rob. 324), "that can be laid down generally, I may venture to hold that time is the grand ingredient in constituting domicil; I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive; it is not unfrequently said, that if a person comes only for a special purpose, that shall not fix a domicil. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that may *probably*, or does actually, detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose. A special purpose may lead a man to a country, where it shall detain him the whole of his life. A man comes here to follow a law suit; it may happen, and, indeed, is often used as a ground of vulgar and unfounded reproach (unfounded as matter of reproach, though the fact may be true) on the laws of this country, that it may last as long as himself. Some suits are famous in our juridical history for having even outlived generations of suitors. I cannot but think that, against such a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a case, that other purposes forced themselves upon him, and mixed themselves with his original design, and impressed upon him the character of the country where he resided. Suppose a man comes into a belligerent country at or before the beginning of a war, it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contributing, by payment of taxes

and other means, to the strength of that country, I am of opinion that he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original, and sole purposes of a long continued residence. There is a time which will estop such a plea; no rule can fix the time *a priori*, but such a time there *must* be.

"In proof of the efficacy of mere time, it is not impertinent to remark, that the same quantity of business which would not fix a domicil in a certain space of time, would, nevertheless, have that effect, if distributed over a larger space of time. Suppose an American comes to Europe with six contemporary cargoes, of which he had the present care and management, meaning to return to America immediately; they would form a different case from that, of the same American, coming to any particular country of Europe, with one cargo, and fixing himself there to receive five remaining cargoes, one in each year successively. I repeat, that time is the great agent in this matter; it is to be taken in a compound ratio, of the time and the occupation, with a great preponderance on the article of time. Be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicil." (See also *The Ann Greene and Cargo*, 1 Gallison, 284.)

So, in *The Diana* (5 Rob. 60), Lord Stowell decided "that mere recency of establishment would not avail, if the intention of making a permanent residence there was fully fixed upon the party." In *The Venus* (8 Cranch, 253), the decisions of the English courts on the subject of national character acquired by residence are fully confirmed by the American judges.

Where, however, there is not an intention to remain, the abode is not considered as a residence to any hostile purpose. The case of *The Ocean* (5 Rob. 90) was, that of a claim given on behalf of a British born subject, who had been settled as a merchant at Flushing, but who, on the appearance of approaching hostilities, had taken means to move himself, and return to England. The affidavit of the claimant stated, that, in July, 1803, he actually effected his escape, and returned to this country; that he had actually dissolved his partnership; and that he had continued to reside in Holland after the war only under the detention so unwarrantably applied to all Englishmen resident in the country of the enemy at the breaking out of hostilities. "Under these circumstances," said Lord Stowell, "it would, I think, be going farther than the principle of law requires, to conclude this person, by his former occupation, and by his constrained residence in France, so as not to admit him to have taken himself out of the effect of supervening hostilities by the means which he had used for his removal." The same point is incidentally but decisively laid down by Lord Ellenborough, in the cases of *Bromley* v. *Heseltine* (1 Camp. 76), and *O'Mealy* v. *Wilson* (ib. 482).

On the other hand, the native character easily reverts, and it requires fewer circumstances to constitute domicil in the case of a native subject, than to impress the national character on one who is originally of another country. The case of the *Virginie* (5 Rob. 98) was that of a M. Lappierre, who, by birth a Frenchman, was present in a French colony, where he shipped goods for France. The goods were captured, and he put in his claim as a merchant of America,

where he had resided before his coming to the French colony. Lord Stowell said:—"If it could be inferred that he had been originally a French merchant, and was, at the time of shipment, resident in St. Domingo, and shipping property to old France, I should have hesitation in considering him as a Frenchman. Had the shipment been made for America, his asserted place of abode, it might have been a circumstance to be set in opposition to his present residence, and might afford a presumption that he was in St. Domingo only for temporary purposes. But this is a shipment to France, from a French colony, and if the person is to be taken as a native of France, the presumption would be, that he had returned to his native character of a French merchant."

Where a citizen, a native of the United States, emigrated before a declaration of war to a neutral country, there acquired a domicil, and afterwards returned to the United States during the war, and reacquired his native domicil, he became a redintegrated American citizen, and could not afterwards, *flagrante bello*, acquire a neutral domicil by again emigrating to his adopted country. (*The Dos Hermanos*, 2 Wheat. 76; *The Ann Greene and Cargo*, 1 Gallison, 284.)

Where the intention of remaining exists voluntarily and without restraint, the commercial residence is usually held to be complete, whether it be a literal and actual, or only an implied residence. In *The Indian Chief* (3 Rob. 12), it was objected against the claim of the captors, that the residence of an American in Calcutta was not a residence among British belligerents; that the Mogul, having the imperial rights of Bengal, the King of Great Britain does not hold the British

possessions in the East Indies in the right of the sovereignty; and that, therefore, the character of British merchants does not necessarily attach on foreigners locally resident there. This objection was thus overruled by Lord Stowell: "Taking it that such a paramount sovereignty on the part of the Mogul princes really and solidly exists, and that Great Britain cannot be deemed to possess a sovereign right there, still it is to be remembered that wherever even a mere factory is founded in the eastern parts of the world, European persons, trading under the shelter and protection of those establishments, are conceived to take their national character from that association under which they live and carry on their commerce. It is a rule of the law of nations, applying peculiarly to those countries, and is different from what prevails ordinarily in Europe and the western parts of the world, in which men take their present national character from the general character of the country in which they are resident; and this distinction arises from the nature and habit of the countries. In the western parts of the world, alien merchants mix in the society of the natives, access and intermixture are permitted, and they become incorporated to almost the full extent. But in the east, from the oldest times, an immiscible character has been kept up, foreigners are not admitted into the general body and mass of the society of the nation. They continue strangers and sojourners, as all their fathers were; not acquiring any national character under the general sovereignty of the country, and not trading under any recognised authority of their own original country, they have been held to derive their present character from that of the association or factory under whose

protection they live and carry on their trade. With respect to establishments in Turkey, it was declared, in the case of Mr. Fremeaux, in the last war, that a merchant carrying on trade at Smyrna, under the protection of the Dutch Consul at Smyrna, was to be considered as a Dutchman, and, in that case, the ship and goods belonging to Mr. Fremeaux being taken after the order of reprisals against Holland, were condemned as Dutch property. So in China, and I may say generally throughout the East, persons admitted into a factory, are not known in their own peculiar national character, and not being admitted to assume the character of the country, they are considered only in the character of that association or factory. I remember perfectly well, in the case of M. Constant de Rubecque, it was the opinion of the Lords, that, although he was a Swiss by birth, and no Frenchman, yet if he had continued to trade in the French factory in China, which he had fortunately quitted before the time of capture, he would have been liable to be considered as a Frenchman. I am, however, inclined to think, that these considerations are unnecessary, because, though the sovereignty of the Mogul is occasionally brought forward for purposes of policy, it hardly exists otherwise than as phantom. It is not applied in any way for the actual regulation of our establishments. This country exercises the power of declaring war and peace, which is among the strongest marks of actual sovereignty, and if the high, or as I may almost say, this empyrean sovereignty of the Mogul is sometimes brought down from the clouds as it were, for purposes of policy, it by no means interferes with that actual authority which this country and the

East India company, a creature of this country, exercises there with full effect. The law of treason, I apprehend, would apply to Europeans, living there, in full force; it is nothing to say, that some particular parts of our civil code are not applicable to the religious or civil habits of the Mahomedan or Hindoo natives, and that they are, on that account, allowed to remain under their own laws. I say this is no exception, for, with respect to internal regulations, there is amongst ourselves, in this country, a particular sect, the Jews, that, in matters of legitimacy, and on other important subjects, are governed by their own particular regulations, and not by all the municipal laws of this country, some of which are totally inapplicable to them. It is besides observable, that our own acts of parliament, and our public treaties, have been by no means scrupulous, in later times, in describing the country in question, as the territory of Great Britain. In the American treaty, the particular expression occurs, that the citizens of America shall be admitted, and hospitably received in all the sea-ports and harbours of the British territories in India. The late case in the Court of King's Bench, *Wilson* v. *Marrayat* (8 T. R. and 1 Bos. & Pul. 430), arising upon the interpretation of that treaty, and in which it appears to have been the inclination of that court to hold our possessions in India to come within the operation of the Navigation Acts, gave occasion to an act of parliament, in which the term British territory is borrowed from the treaty. There is likewise a general act, of 37 Geo. 3, c. 117, for the allowance of neutral traders in India, which expressly uses the same term, reciting that it is

expedient, that the ships and vessels of countries and states, in amity with his Majesty, should be allowed to import goods and commodities into, and export the same from, the British territories in India. It is, besides, an obvious question, to whom are the credentials of this gentleman, as consul, addressed? certainly to the British government, to the East India company, and not to the Mogul. What is the condition of a foreign merchant residing there? From attention to the argument of a gentleman, whose researches have been particularly turned to subjects connected with the East, I have made inquiry of a person of the greatest authority on such a subject, who is just returned from the highest judicial situation in that country, and the result is, as on general principles I should certainly have expected, that a foreign merchant, resident there, is just in the same situation with a British merchant, subject to the same obligations, bound by the same duties, and amenable to the same common authority of British tribunals." It being insinuated in the same case, as a further objection, that Mr. Millar was not a general merchant of Calcutta, Lord Stowell shortly observed upon it in these words: "Whether he was a general merchant or not is totally immaterial, for if this was even his first adventure, still, in this transaction, he must be taken as a merchant, and can be considered in no other character.

When a person has fixed his residence in a hostile or neutral country, with a voluntary intention of remaining, his national character, communicated by that residence, will not be divested by his periodical absence on account of professional avocations. *The Junge Ruiter*, 1 Acton, 116.) On the other hand a

merchant having a fixed residence, and carrying on business at the place of his birth, does not acquire a foreign commercial character by occasional visits to a foreign country. (*The Nereide*, 9 Cranch, 388.)

It is not invariably necessary in order to impress a man with a national character, that his residence in the hostile or neutral country should be personal. A merchant trading to a foreign nation does not, indeed, as a rule, contract the character of that nation by the residence of a stationed agent, but when the agent so residing performs duties for his employer, which imply that this employer considers himself as being virtually a resident of the country, where in fact his agent resides, that is, in short, where the agent instead of being the mere factor, becomes the deputy of his employer, the latter seems sufficiently invested with the national character by the residence of his agent. In *The Anne Catherina* (4 Robinson, 107), a contract had been made with a hostile goverment; a contract which, from the peculiar privileges annexed to it, not only placed the contractors, being neutrals, upon the footing of Spanish subjects, but perhaps might be considered as going further still, and giving them privileges to which a Spanish merchant, merely as a native subject of Spain, would probably not have been admitted. For the purpose of executing this contract, the merchants engaged in it thought fit not indeed to reside themselves in the hostile territory, but to commission an agent, who did reside there. On this residence by agent Lord Stowell thus animadverted in his judgment:—"It is not indeed held in general cases, that a neutral merchant, trading in an ordinary manner to the country of a belligerent, does contract the character of a person domiciled

there by the mere residence of a stationed agent; because in general cases the effect of such a residence is counteracted by the nature of the trade, and the neutral character of the British merchant himself. But it may be very different where the principal is not trading on the ordinary footing of a foreign merchant, but as a privileged trader of the enemy. There the nature of his trade does not protect him; on the contrary, the trade itself is the privileged trade of the enemy, putting him on the same footing as their own subjects, and even above it."

This principle is fully confirmed by the American Courts. Where a person is engaged in the ordinary or extraordinary commerce of an enemy's country, upon the same footing and with the same advantages as native resident subjects, his property employed in such trade is deemed incorporated into the general commerce of that country and subject to confiscation, be his residence where it may. (*San Jose Indiano*, 2 Gallison, 268.) A shipment made by a house in the enemy's country, on account and risk of a *bonâ fide* and exclusively neutral partner or house, is not subject to confiscation as prize of war, and the same principle applies in the converse case of a partner or agent, domiciled in the enemy's country, and making shipment to his neutral house, or principal, on the exclusive account of the latter. (*Ib.*)

A person holding the office of Consul in a foreign state, though he does not reside there himself, but commits his whole duty to Vice-Consuls, must be deemed to be virtually a resident of that state where the commission of his office implies him to reside; and the appointment of deputies is a proof that he still considers himself as retaining the office to which this implied

residence attaches, though he may have found it convenient to avoid the personal burden of its functions. In *The Dree Gebroeders* (4 Rob. 232), the claimant, who represented himself as an American, stated in his affidavit, that the government of the United States had appointed him Consul-General for Scotland, but that he had not yet acted further in that capacity than to appoint deputies. Lord Stowell said, "It will be a strong circumstance to affect him with a British residence, as long as there are persons acting in an official situation here, and deriving their authority from him. (See also Vattel, B. 4, c. 8, s. 114; *The Indian Chief*, 3 Rob. 22.)

To establish the *animus manendi*, the external circumstances need not be notorious or numerous; the intention of remaining will still be the decisive proof. In *The Jonge Klassina* (5 Rob. 297), the claimant, wishing to persuade the Court that he was not to be deemed a resident in the hostile country, pleaded that he had no fixed counting-house there. Lord Stowell said, "That he had no fixed counting-house in the enemy's country will not be decisive. How much of the great mercantile concerns of this kingdom is carried on in coffee-houses? A very considerable portion of the great insurance business is so conducted. It is indeed a vain idea, that a counting-house or fixed establishment is necessary to make a man a merchant of any place: if he is there himself, and acts as a merchant of that place, it is sufficient; and the mere want of a fixed counting-house there will make no breach in the mercantile character, which may well exist without it."

Persons affected with hostile residence, in a hos-

tile or neutral country, are to be deemed enemies only with reference to the seizure of so much of their commerce as is connected with that residence or establishment. Lord Stowell lays it down, in *The Jonge Klassina* (5 Rob. 297), "That a man having mercantile concerns in two countries, and acting as a merchant of both, must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries." So, too, in *The Herman* (4 Rob. 228), Lord Stowell said, "The personal domicil of the claimant is at Embden, where he resides, and has a house of trade; he is only connected with this country by his partnership in a house here, which is to be taken in a manner as collateral, and secondary to his house at Embden; that he may carry on trade with the enemy at his house in Embden cannot be denied, provided it does not originate from his house at London, nor vest an interest in that house."

The case of *The Portland*, and nine other ships (3 Rob. 41), still more precisely establishes the distinction, in respect of liability to capture, between the trade which a merchant may be carrying on to his hostile, and that which he he may be carrying on to his neutral establishment. The claimant resided in a neutral territory, but he had two settlements, or places of resort for his business; one in a neutral territory, and the other in a hostile country, at Ostend. Lord Stowell said, "As to the circumstance of his being engaged in trading with Ostend, I think it will be difficult to extend the consequences of that act, whatever they may be, to the trade which he was carrying on at Hamburgh, and having no connection with Ostend; because, call it what you please, a colourable charac-

ter as to the trade carried on at Ostend, I cannot think that it will give such a colour to his other commerce as to make that liable for the frauds of his Ostend trade; as far as the person is concerned, there is a neutral residence; as far as the commerce is concerned, the nature of the transaction and the destination are perfectly neutral, unless it can be said that trading in an enemy's commerce makes the man, as to all his concerns, an enemy; or that, being engaged in a house of trade in the enemy's country, would give a general character to all his transactions. I do not see how the consequences of Mr. Ostermeyer's trading to Ostend can affect his commerce in other parts of the world. I know of no case, nor of any principle, that would support such a position as this,—that a man having a house of trade in the enemy's country, as well as in a neutral country, should be considered in his whole concerns as an enemy's merchant, as well in those which respected solely his neutral house, as in those which belonged to his belligerent domicil." (See 1 Camp. 76.)

As by the commencement of a residence in a hostile state, a hostile character is acquired, so it is terminated by the cessation of that residence. This is decided in the case of *The Indian Chief* (3 Rob. 12).

"It is a doctrine, supported by strong principles of equity and propriety," said Lord Stowell, in *The Vigilantia* (1 Rob. 13; see also *The Portland*, 3 Rob. 41), "that there is a traffic which stamps a national character in the individual, independent of that character which mere personal residence may give. And it was expressly laid down in the case of *The Nancy* and other ships, which was heard before the Lords on

the 9th of April, 1798, that if a person entered into a house of trade in the enemy's country, in time of war, or continued that connection during the war, he should not protect himself by mere residence in a neutral country."—This position, that he who maintained an establishment, or house of commerce, in a hostile country, is to be considered as impressed with a hostile character, with reference to so much of his commerce, as may be connected with that establishment, is confirmed by a great variety of other cases; which prove, too, that the rule is the same, whether he maintained that establishment as a partner, or as a sole trader. (3 Rob. 31.)

The national character of a vessel, where there is nothing particular or special in the conduct of the vessel itself, is determined by the residence of the owner; but there may be circumstances arising from that conduct, which will lead to a contrary conclusion. It is a known and established rule with respect to a vessel, that if she is navigating under the pass of a foreign country, she is considered as bearing the national character of that nation under whose pass she sails; she makes a part of its navigation, and is, in every respect, liable to be considered as a vessel of that country. In like manner, and upon similar principles, if a vessel purchased in the enemy's country is, by constant and habitual occupation, continually employed in the trade of that country, commencing with the war, continuing during the war, and evidently on account of the war, that vessel is to be deemed a ship of the country from which she is so navigating, in the same manner as if she evidently belonged to the inhabitants of it.

"Here"—continued Lord Stowell, in condemning *The Vigilantia* (1 Robinson, 1)—is a Dutch-built vessel, a Dutch fishing vessel, that went from Amsterdam, regularly and habitually, to Greenland, and to return to Amsterdam, there to deliver her cargo; she is purchased in Holland; she is purchased avowedly for the purpose of pursuing the same course of commerce, the fishing trade of Holland; she is purchased at a time when, it is said, there was a defect of conveniences for carrying on this trade at Embden [*the alleged residence of the master, but where he himself swore he had never been in his life*]; but I am satisfied it was the intention of the parties to carry on this trade to and from Amsterdam. Now I ask upon what grounds is it that this vessel, so purchased and so employed, is to be considered merely as a Prussian vessel? Here is a ship as thoroughly engaged and incorporated in Dutch commerce as a ship can possibly be; she is fitted out uniformly from Amsterdam; she is fitted out with Dutch manufacture; she is fitted out for Dutch importation, *in all respects employing and feeding the industry of that country.* She is managed by a Dutch ship's-husband, and finding occupation for the commercial knowledge and industry of the subjects of that country; she is commanded by a Dutch captain; she is manned by a Dutch crew, and brings back the produce of her voyage for the purpose of Dutch consumption and Dutch revenue. If to this you add that the vessel is transferred by the Dutch, because they themselves are unable to carry on the trade avowedly in their own persons, it is truly a Dutch commerce in a very eminent degree, not only

in its essence, but for the very hostile purpose of rescuing and protecting the Dutch from the naval superiority of their British enemy. There had been a determination last war, in the case of two persons, one resident at Saint Eustatius, and the other in Denmark, who were partners in a house of trade at Saint Eustatius. The one who resided there forwarded the cargoes to Europe; the other received them at Amsterdam, disposed of them there, and then returned to Denmark. It was decided in that case, that the share of the person resident in Saint Eustatius was liable to condemnation, as the property of a domiciled Dutchman, and that the share of the other partner should be restored, as the property of a neutral. (*The Jacobus Johannes*, House of Lords, Feb. 10, 1785.) There was also a case in this war of some persons who migrated from Nantucket to France, and there carried on a fishery very beneficial to the French; in that case, the property of a partner domiciled in France was condemned, whilst the property of another partner, resident in America, was restored. From these two cases a notion had been adopted that the domicil of the parties was that alone to which the Court had a right to resort; but the case of *Coopman* (House of Lords, April 9, 1798) was lately decided on very different principles. It was there said by the Lords, that the former cases were cases merely at the commencement of a war; that in the case of a person carrying on trade habitually in the country of the enemy, though not resident there, he should have time to withdraw himself from that commerce, and that it would press too heavily on neutrals to say that, immediately on the first breaking out of a war, their

goods should become subject to confiscation; but it was then expressly laid down, that if a person entered into a house of trade in the enemy's country in time of war, or continued that connection during the war, he should not protect himself by mere residence in a neutral country. That decision instructs me in this doctrine, a doctrine supported by strong principles of equity and propriety, 'that there is a traffic which stamps a national character on the individual, independent of that character which mere personal residence may give him.'"

In a subsequent case (*The Embden*, Robinson, i. 16), which it was sought to discriminate from the preceding by the circumstance that the master was a Prussian born, Lord Stowell said: "I think he has scarcely a right to be considered as a Prussian subject; he is a single man who has established no domicil by family connections; and in his own person he has been employed constantly for ten years in trading from Amsterdam to Greenland; by such an occupation he is divested of his national character, and becomes, by adoption, a perfect Dutchman." The principle was affirmed by the House of Lords, on appeal, Feb. 10, 1800.

Again, in the case of (*The Endraught*, 1 Robinson, 21), Lord Stowell said, "mere nominal residence will not suffice. The residence which the Court requires must be taken up honestly, with a *bonâ fide* intention of making it the place of habitation."

Another mode in which a hostile character may be impressed, is by dealing in those branches of commerce which are usually confined to the subjects of the adverse belligerents themselves. The rule on this

point may be collected from the case of *The Princesa*, (2 Robinson, 49).

"This," said Lord Stowell, "is a Spanish frigate, employed as a packet of the king of Spain, to bring bullion and specie from South America to Old Spain; and I think the presumption is most strong, that none but Spanish subjects are entitled to the privilege of having money brought from that colony to Spain. I have looked carefully through the manifest, and I perceive there is not one shipment but in the name of Spaniards; therefore it appears that this is not an ordinary trade; and I must take this to be property which must have been considered as Spanish, and which could not have been exported in any other character. It has been decided by the Lords, in several cases, that the property of British merchants, even shipped before the war, yet if in a Spanish character, and in a trade so exclusively peculiar to Spanish subjects, as that no foreign name could appear in it, must take the consequences of that character, and be considered as Spanish property."

That he who is permitted by the enemy to deal, and does deal accordingly, in branches of commerce, usually confined to the subjects of the enemy, must be deemed an enemy himself, is further established by the case of *The Anna Catharina* (4 Rob. 107), in which there was a contract between the Spanish Government, then at war with this country, and certain persons claiming to be considered as neutrals. But the Court held, that as the contract was of so privileged a nature, that none but Spanish merchants would have been admitted to it; and not even Spanish merchants merely as such, it did in fact carry

with it, in the hands of the contractors, a character decidedly Spanish, and that character was held to adhere to the contract, not only in the hands of the party with whom it was originally made, but when in the hands of those whom he had subsequently admitted to share it. "It is by nothing peculiar in his own character," said Lord Stowell, "that the original contractor would be liable to be considered as a Spanish merchant, but merely by the acceptance of this contract, and by acting upon it. If other persons take their share, and accept those benefits, they take their share also in the legal effects. They accepted his privileges; they adopted his resident agent. It would be monstrous to say that the effect of the original contract is to give the Spanish character to the contracting person, but that he may dole it out to an hundred other persons, who in their respective portions are to have the entire benefit, but are not to be liable to the effect of any such imputations. The consequence would be, that such a contract would be protected, in the only mode in which it could be carried into effect; for a contract of such extent must be distributed; and if every subordinate person is protected, then here is a contract which concludes the original undertaker of the whole, but in no degree affects one of those persons who carry that whole into execution."

The hostile character annexable to the property of the neutral, engaged in a trade peculiar to the enemy, comprehends a strict exclusive colonial trade from the colony of the mother country, where the trade is limited to native subjects by the fundamental regulations of the state, and the national character is required to be

established by oath, as in the case of the Spanish register ships. (*Vrow Anna Catharina*, 5 Robinson, 161.)

There are yet other modes in which a hostile character may be affixed to property. Such is the sailing of the vessel under the flag and pass of an enemy. The case which most distinctly decides this point is that of *The Elizabeth* (5 Rob. 2). "By the established rules of law," said Lord Stowell, "it has been decided that a vessel sailing under the colours and pass of a nation is to be considered clothed with the national character of that country. With goods it may be otherwise; but ships have a peculiar character impressed upon them by the special nature of their documents, and have always been held to the character with which they are so invested, to the exclusion of any claims of interest, that persons living in neutral countries may actually have in them. In the war before the last, this principle was strongly recognised in the case of a ship, taken on a voyage from Surinam to Amsterdam, and documented as a Dutch ship. Claims were given for specific shares, on behalf of persons residing in Switzerland; and one claim was on behalf of a lady to whom a share had devolved by inheritance, whether during hostilities or no, I do not accurately remember; but if it was so, she had done no act whatever with regard to that property, and it might be said to have dropped by mere accident into her lap. In that case, however, it was held, that the fact of sailing under the Dutch flag and pass was decisive against the admission of any claim; and it was observed, that as the vessel had been enjoying the privileges of a Dutch character, the parties could not expect to reap the advantages of such an employment without

being subject, at the same time, to the inconveniencies attaching on it." To this case of *The Elizabeth* (5 Rob. 2), Sir C. Robinson has subjoined a note, containing a report of the case of *The Vreede Schottys*, in which the Court laid down the distinction as to hostility of character between the ships and the cargo, in the following terms:—"A great distinction has been always made by the nations of Europe, between ships and goods; some countries have gone so far as to make the flag and pass of the ship conclusive on the cargo also, but this country has never carried the principle to that extent. It holds the ship bound by the character imposed upon it by the authority of the government, from which all the documents issue. But goods which have no such dependence upon the authority of the state may be differently considered."

The doctrine of the federal Courts in the United States has been very strict on this point; and it has been frequently decided (*The Julia*, 1 Gall. 605, 8 Cranch, 181; *The Aurora*, ib. 203; *The Hiram*, ib. 444; *The Ariadne*, 2 Wheaton, 100), that sailing under the licence and passport of protection of the enemy, in furtherance of his views and interests, was, without regard to the object of the voyage, or the port of destination, such an act of illegality as subjected both ship and cargo to confiscation as prize of war. The federal Courts placed the objection to these licences on the ground of a pacific dealing with the enemy, and as amounting to a contract, that the party to whom the licence is given should, for that voyage, withdraw himself from the war, and enjoy the repose and blessings of peace. The illegality of such an intercourse was strongly condemned; and it was held, that the moment the vessel sailed on the voyage with an enemy's

licence on board, the offence was irrevocably committed and consummated, and that the *delictum* was not done away even by the termination of the voyage, but the vessel and cargo might be seized after arrival in a port of the United States, and condemned as lawful prize.

Goods, which, at the commencement of the voyage, have borne a hostile character, cannot, as a rule, change that character on their passage or *in transitu*. "The first objection that has been taken is, that such a transfer is invalid, and cannot be set up in a prize court, where the property is always considered to remain in the same character in which it was shipped till the delivery. If that could be maintained, there would be an end of the question, because it has been admitted that these wines were shipped as *Spanish* property, and that Spanish property is now become liable to condemnation. But I apprehend it is a position which cannot be maintained in that extent. In the ordinary course of things in time of peace—for it is not denied that such a contract may be and effectually made (according to the usage of merchants)—such a transfer *in transitu* might certainly be made. It has even been contended that a mere delivery of the bill of lading is a transfer of the property. But it might be more correctly expressed, perhaps, if said that it transfers only the right of delivery; but that a transfer of the bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties, and all others, cannot be well doubted. When war intervenes, another rule is set up by Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property

shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers, which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu*, and in that sense I recognize it as the rule of this Court. But this, as I have said, arises out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating, like this, in a time of peace. The transfer must, therefore, be considered as not invalid in point of law at the time of the contract; and being made before the war, it must be judged according to the ordinary rules of commerce. (*The Vrow Margaretha*, 1 Rob. 337.)

Property sent from a late hostile colony cannot change its character *in transitu*, although the owners become British subjects by capitulation before capture. The *Negotie en Zeevaart* sailed from Demerara for Middelburgh, in Holland, 30th Jan., 1781, about six weeks after the hostilities against Holland. Demerara surrendered to the British forces on the 14th March; the *Negotie* was captured at sea on the 25th of March. "The terms of capitulation," says Lord Stowell (1 Rob. 111), "were very favourable; the inhabitants were to take the oath of allegiance, to be permitted to export their own property, and to be treated, *in all respects*, like British subjects, till his Majesty's pleasure could be known; and although this was in the first instance only under the proclamation of the captor, still that being accepted, it took complete effect. These terms were afterwards confirmed by the King; there

was, therefore, as strong a promise of protection as could be, and recognized and confirmed by the supreme authority of the state. Under these circumstances, the Judge of the Admiralty thought the claim so strong that he actually restored; and it was not *his* opinion alone. On appeal, however, the Lords were of opinion that property sailing after declaration of hostilities, and before a capitulation, and taken on the voyage, was not protected by the intermediate capitulation. It was not determined on any ground of illegal trade, nor on any surmise that when the owners became British subjects, the trade in which the property was embarked became, *ex post facto*, illegal; nor was it at all taken into consideration that Demerara had again become a Dutch colony at the time of adjudication. It was declared to be adjudged on the same principles as if the cause had come on at the time of capture. It was not on any of these grounds, but simply on the ground of Dutch property, that condemnation passed. *The ship sailed as a Dutch ship, and could not change her character in transitu.* This was the *dictum* of a great law lord then present—Lord Camden." See also *The Danhebaar Affrican* (1 Rob. 107), and *The Jan Frederick* (5 Rob. 128).

All the cases to which reference has been made were cases of *bonâ fide* transfers, but in many instances a belligerent, finding it impossible to protect his own trade under his own flag, transfers it to a neutral fraudulently; that is, either nominally or without a reservation of its solid advantages to himself, or actually for a time, with a condition that the neutral shall restore it on the conclusion of peace. All these colourable transfers are held to be illegal, and the circumstances of them are as various as may

be expected from the ingenuity of men, who have great interests at stake. The cases arising upon these and other frauds are almost all mere questions of evidence, turning solely on the construction which the transaction can be made to bear, by the acuteness of the captors on the one hand in tracking the deceit, and by the dexterity of the claimants on the other, in eluding the investigation.

"A sale made by an enemy to neutrals in time of war must be an absolute unconditional sale, and not a mere transfer evidently made to cover the property during the war." (*The Anoydt Gedacht*, 2 Rob. 137.) The illegality of transfer during or in contemplation of war is for the sake of the belligerent right; and to prevent secret transfers from the enemy to neutrals in fraud of that right, and upon conditions and reservations which it might be impossible to detect,—any equity of redemption or other defeasance will be considered to keep the title still in the enemy. (*The Sechs Geschwistern*, 4 Rob. 100.)

Reservations of risk to the neutral consignors, in order to protect belligerent consignees, are uniformly treated by the Admiralty Court as fraudulent and invalid. The principal case on this point is that of *The Sally* (5 Rob. 300). The cargo, which occasioned the question in the case of the Sally, had been shipped during the last war, ostensibly on the account of American merchants: the master deposed as to his belief, that it would have become the property of the French Government upon being unladen. The sale, therefore, had obviously been completed, and the pretext of an American risk and account was merely to evade that capture to which the cargo would have been subject, if it had sailed avowedly as French pro-

perty: the Court said, "It had always been the rule of the prize court, that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu* is to be considered as enemy's property. When the contract is made in time of peace, or without any contemplation of a war, no such rule exists. But in a case like the present, where the form of the contract was framed directly for the purpose of obviating the danger apprehended from approaching hostilities, it is a rule which unavoidably must take place. The bill of lading expresses account and risk of the American merchants; but papers alone make no proof, unless supported by the deposition of the master. Instead of supporting the contents of his papers, the master deposes, 'That on arrival, the goods would become the property of the French government,' and all the concealed papers strongly support him in this testimony: the *evidentia rei* is too strong to admit of further proof. Supposing it to become the property of the enemy on delivery, capture is considered as delivery: the captors, by the right of war, stand in the place of the enemy, and are entitled to a condemnation of goods passing under such a contract, as of enemy's property." (Per Sir P. Arden, M.R., in the *Sally Griffiths*, 3 Rob. 302.) But if a shipment be made in peace, and not in expectation of war, and the contract lays the risk of the shipment on the neutral consignor, the legal property will remain until the end of the voyage in the consignor. In the leading case of the packet *De Bilboa* (2 Rob. 133), which was that of a shipment at the risk of the consignor until delivery, as having been made before the war, Lord Stowell said, "The statement of the claim sets forth

that these goods have not been paid for by the Spaniard; that would go but little way,—that alone would not do; there must be many cases in which British merchants suffer from capture, by our own cruizers, of goods shipped for foreign account before the breaking out of hostilities. It goes on to state, 'that according to the custom of the trade, a credit of six, nine, or twelve months, is usually given, and that it is not the custom to draw on the consignee till the arrival of the goods;—that the sea risk in peace, as well as war, is on the consignor; that he insures and has no remedy against the consignee for any accident that happens during the voyage.' Under these circumstances, in whom does the property reside? The ordinary state of commerce is, that goods ordered and delivered to the master are considered as delivered to the consignee, whose agent the master is in this respect; but that general contract of the law may be varied by special agreement, or by a particular prevailing practice, that pre-supposes an agreement amongst such a description of merchants. In time of profound peace, when there is no prospect of approaching war, there would be unquestionably nothing illegal in contracting that the whole risk should fall on the consignor, till the goods came into possession of the consignee. In time of peace they may divide their risk as they please, and nobody has a right to say they shall not; it would not be at all illegal, that goods not shipped in time of war, or in contemplation of war, should be at the risk of the shipper. In time of war, this cannot be permitted, for it would at once put an end to all captures at sea; the risk would in all cases be laid on the consignor, where it suited the purpose of protection. On every contem-

plation of war, this contrivance would be practised in all consignments from neutral ports to the enemy's country, to the manifest defrauding of all rights of capture; it is therefore considered to be an invalid contract in time of war, or, to express it more accurately, it is a contract which, if made in war, has this effect—that the captor has a right to seize it, and convert the property to his own use; for he, having all the rights which belong to his enemy, is authorized to have his taking possession considered as equivalent to an actual delivery to his enemy; and the shipper who put it on board, during a time of war, must be presumed to know the rule, and to secure himself in his agreement with the consignee, against the contingency of any loss to himself that can arise from capture. In other words, he is a mere insurer against sea risk, and he has nothing to do with the case of capture, the loss of which falls entirely on the consignee. If the consignee refuses payment and throws it upon the shipper, the shipper must be supposed to have guarded his own interest against that hazard, or he has acted improvidently and without caution. The present contract, however, is not of this sort; it stands as a lawful agreement, being made whilst there was neither war nor prospect of war. The goods are sent at the risk of the shipper: if they had been lost, on whom would the loss have fallen but on him? What surer test of property can there be than this? It is the true criterion of property, that, if you are the person on whom the loss will fall, you are to be considered as the proprietor. To make the loss fall upon the shipper, in such cases, would be harsh in the extreme. He ships his goods in the ordinary course of traffic,

by an agreement mutually understood between the parties, and in no wise injurious to the rights of any third party; an event subsequently happens which he could in no degree provide against. If he is to be the sufferer, he is a sufferer without notice, and without the means of securing himself; he was not called upon to know that the injustice of the other party would produce a war before the delivery of his goods." On this point Chancellor Kent (i. 94) observes, "Such agreements, if they could operate, would go to cover all belligerent property, while passing between a belligerent and neutral country, since the risk of capture would be laid alternately on the consignor or consignee, as the neutral factor should happen to stand in the one or the other of these relations."

"These principles of the English Admiralty have (says Chancellor Kent, i. 94) been explicitly recognised and acted upon by the Prize Courts in the United States. The great principles of national law were held to require, that in war enemy's property should not change its hostile character *in transitu;* and that no secret liens, no future election, no private contracts, looking to future events, should be able to cover private property while sailing on the ocean. Captors disregard all equitable liens on enemy's property, and lay their hands on the gross tangible property, and rely on the simple title in the name and possession of the enemy. If they were to open the door to equitable claims, there would be no end to discussion and imposition, and the simplicity and celerity of proceedings in Prize Courts would be lost." (*The Josephine,* 4 Rob. 25; *The Tobago,* 5 Rob. 218; *The Marianna,* 6 Rob. 24; *The Francis,* 1 Gallison, 445; 8 Cranch,

335, 359.) It is the general rule and practice in the Admiralty, on questions depending upon title to vessels, to look to the legal title without taking notice of equitable claims. (*The Sisters*, 5 Rob. 155; Duer on Insurance, i. 478.)

Where a contract of transfer is made in contemplation of peace, after the signature of preliminaries, the transfer, as not tending to defeat a belligerent's right of capture, is legal. (*Vrow Catharina*, 5 Rob. 161.)

ALLIES.

If one nation be bound by treaty to afford assistance in a case of war between its ally and a third power, the assistance is to be given whenever the *casus fœderis* occurs; but a question will sometimes arise, whether the government which is to afford the aid is to judge for itself of the justice of the war on the part of the ally, and to make the right to assistance depend upon its own judgment. Grotius is of opinion (B. ii. c. 25) that treaties of that kind do not oblige us to participate in a war which appears to be manifestly unjust on the part of the ally; and it is said to be a tacit condition annexed to every treaty made in time of peace, and stipulating to afford succour in time of war, that the stipulation is only to apply to a just war. To give assistance in an unjust war, on the ground of the treaty, would be contracting an obligation to do injustice, and no such contract is valid. (Vattel, B. ii. c. 12, s. 168; B. iii. c. 6, ss. 86, 87.) But to set up a pretext of this kind to avoid a positive engagement is extremely hazardous, and it cannot be done except in a very clear

case, without exposing the nation to the imputation of a breach of public faith. In doubtful cases, the presumption ought rather to be in favour of our ally, and of the justice of the war. The doctrine that one nation is not bound to assist another, under any circumstances, in a war clearly unjust, is similar to the principle in the feudal law, to be met with in the Book of Feuds compiled from the usages of the Lombards, and forming part of the common law of Europe during the prevalence of the feudal system. A vassal refusing to assist his liege lord in a just war forfeited his feud. If the justice of the war was even doubtful, or not known affirmatively to be unjust, the vassal was bound to assist; but if the war appeared to him to be manifestly unjust, he was under no obligation to help his lord to carry it on offensively. (Feud., Lib. ii. tit. 28, s. 1.) A nation which has agreed to render assistance to another, is not obliged to furnish it when the case is hopeless, or when giving the succours would expose the state itself to imminent danger. Such extreme cases are tacit exceptions to the obligation of the treaty; but the danger must not be slight, remote, nor contingent, for this would be to seek a frivolous cause to violate a solemn engagement. (Vattel, B. iii. c. 6, s. 92.) In the case of a defensive alliance, the condition of the contract does not call for the assistance, unless the ally be engaged in a defensive war; for in a defensive alliance the nation engages only to defend its ally in case he be attacked, and even then we are to inquire whether he be not justly attacked. (Vattel, *ubi sup.*) The defensive alliance applies only to the case of a war first commenced *de facto* against the ally; and the power that first declares, or actually begins, the war,

makes what is deemed, in the conventional law of nations, an offensive war. The treaty of alliance between France and the United States, in 1778, was declared by the second article to be a defensive alliance, and that declaration gave a character to the whole instrument; and, consequently, the guarantee on the part of the United States, of the French possessions in America, could only apply to future defensive wars on the part of France. Upon that ground, the government of the United States, in 1793, did not consider themselves bound to depart from their neutrality, and to take part with France in the war in which she was then engaged. The war of 1793 was first actually declared and commenced by France, against all the allied powers of Europe, and the nature of the guarantee required us only to look to that fact. Several instances are mentioned in Wheaton's Elements of International Law of the occurrence of the *casus fœderis* in the case of a defensive alliance.

BELLIGERENTS TOWARDS EACH OTHER.

The end of war, says Chancellor Kent (i. 96), is to procure by force the justice which cannot otherwise be obtained; and the law of nations allows the means requisite to the end. The persons and property of the enemy may be attacked and captured, or destroyed, when necessary to procure reparation or security. There is no limitation to the career of violence and destruction if we follow the earlier writers on this subject, who have paid too much deference to the

violent maxims and practices of the ancients, and the usages of the Gothic ages. They have considered a state of war as a dissolution of all moral ties, and a licence for every kind of disorder and intemperate fierceness. An enemy was regarded as a criminal and an outlaw, who had forfeited his rights, and whose life, liberty, and property, lay at the mercy of the conqueror. Every thing done against an enemy was held to be lawful. He might be destroyed though unarmed and defenceless. Fraud might be employed as well as force, and force without any regard to the means. But these barbarous rights of war have been questioned and checked in the progress of civilization. Public opinion, as it becomes enlightened and refined, condemns all cruelty, and all wanton destruction of life and property, as equally useless and injurious; and it controls the violence of war by the energy and severity of its reproaches. Grotius, even in opposition to many of his own authorities, and under a due sense of the obligations of religion and humanity, places bounds to the ravages of war, by declaring that the law of nations allows not of the taking the life of an enemy by poison in whatever way administered, or by the hands of assassins, or the doing violence to women or to the dead, or making slaves of prisoners (B. iii. c. iv. 5—7); and the moderation which he inculcated had a visible influence upon the sentiments and manners of Europe.

Under the sanction of his great authority, men began to entertain more enlarged views of national policy, and to consider a mild and temperate exercise of the rights of war to be dictated by an enlightened

self-interest, as well as by the precepts of Christianity. And, notwithstanding some subsequent writers, as Bynkershoeck and Wolfius, restored war to all its horrors, by allowing the use of poison, and other illicit arms; yet such rules became abhorrent to the cultivated reason and growing humanity of the Christian nations. (Montesquieu, Esprit de Lois, B. xv. c. 2.)

The laws of war give no other power over a captive than to keep him safely, and all unnecessary rigour is condemned by the reason and conscience of mankind. (Rutherforth, Institutes, B. ii. c. 9; Martens, B. viii. c. 313.) Vattel (B. iii. c. 8) has entered largely into the subject, and argues with great strength of reason and eloquence against all unnecessary cruelty, all base revenge, and all mean and perfidious warfare; and he recommends his benevolent doctrines by the precepts of exalted ethics and sound policy, and by illustrations drawn from some of the most pathetic episodes in history.

Emerigon (i. 129, 130, 457) refers to ordinances of France and Holland in favour of protection to fishermen during war; and to the like effect was the order of the British Government in 1810, for abstaining from hostilities against the inhabitants of the Feroe Islands and Iceland. So, fishermen were included in the treaty between the United States and Prussia, in 1785, as one of the classes of non-combatants whom the contending parties mutually stipulated not to molest.

"There is a marked difference," says Chancellor Kent, "in the right of war carried on by land and at sea; for, whereas there are great limitations placed

on the operations of war by land, the object of a maritime war being the destruction of the enemy's commerce and navigation, in order to weaken and destroy the foundations of his naval power, the capture or destruction of private property, as essential to that end, is allowed in maritime wars by the law and practice of nations."

"In my opinion," says Lord Stowell (*The Hoop*, 1 Robinson, 196), "there exists such a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoeck as an universal principle of the law—*Ex naturâ belli commercia inter hostes cessare non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio ipso tamen jure belli, commercia esse vetita, ipsæ indictiones bellorum satis declarant, &c.* He proceeds to observe: "The interests of trade and the necessity of obtaining certain commodities have sometimes so far overpowered this rule, that different species of traffic have been permitted, *prout e re suâ, subditorumque suorum esse censent principes.* (Bynk. b. 1, c. 3.) But it is in all cases the act and permission of the sovereign. Wherever that is permitted, it is a suspension of the state of war *quoad hoc.* It is, as he expresses it, *pro parte sic bellum, pro parte pax inter subditos utriusque principis.* It appears from these passages to have been the law of Holland. Valin (lib. 3, tit. 6, art. 3) states it to have been the law of France, whether the trade was attempted to be carried on in national or in neutral vessels: it appears from the case of *The*

Fortuna to have been the law of Spain; and it may, I think, without rashness, be affirmed to have been a general principle of law in most of the countries of Europe.

"By the law and constitution of this country, the sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient; but it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcileable with the general interest of the state. It is for the state alone, on more enlarged views of policy, and of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing, than that of the direct permission of the state. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy; and under colour of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if

necessary) under the eye and control of the government, charged with the care of the public safety? Another principle of law, of a less politic nature, but equally general in its reception and direct in its application, forbids this sort of communication, as fundamentally inconsistent with the relation at that time existing between the two countries; and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians *a persona standi in judicio*. The peculiar law of our own country applies this principle with great rigour.

"The same principle is received in our courts of the law of nations; they are so far *British* courts that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hâc vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the king's peace *pro hâc vice*. But otherwise he is totally *exlex;* even in the case of ransoms, which were contracts, but contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country, for the recovery of his freedom. A state in which contracts cannot be enforced cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor

even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence, and the whole of such commerce is attempted without its protection and against its authority. Bynkershoeck expresses himself with great force upon this argument, in his first book, chapter 7, where he lays down that the legality of commerce and the mutual use of courts of justice are inseparable; he says that cases of commerce are undistinguishable from cases of any other species in this respect. *Si hosti semel permittas actiones exercere, difficile est dixtinguere ex quâ causâ oriantur, nec potui animadvertere illam distinctionem unquam usu fuisse servatam.* Upon these and similar grounds, it has been the established rule of the law of this court, confirmed by the judgment of the supreme court, that a trading with the enemy, except under a royal licence, subjects the property to confiscation; and the most eminent persons of the law sitting in the supreme courts have uniformly sustained such judgments.

"In all cases of this kind which have come before this tribunal they have received an uniform determination. The cases which I have produced prove that the rule has been rigidly enforced—where acts of parliament have, on different occasions, been made to relax the navigation law and other revenue acts—where the government has authorized, under the sanction of an act of parliament, a homeward trade from the enemy's possessions, but has not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence,—that it has been enforced where

strong claim, not merely of convenience, but almost of necessity, excused it on behalf of the individual; that it has been enforced where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; and that it has been enforced, not only against the subjects of the crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied states in war had a right to notice and apply, mutually, to each other's subjects. Indeed, it is the less necessary to produce these cases, because it is expressly laid down by Lord Mansfield, that such is the maritime law of England. (*Gist* v. *Mason*, 1 Term R. 86.)"

The principal cases, which establish the illegality of commerce between belligerents, are *The Hoop*, above quoted, and *Potts* v. *Bell*, and others. (8 Term Reports, 548.) In the first case, Mr. Malcolm of Glasgow and other Scotch merchants had traded to Holland for articles necessary for the agriculture and manufactures of that part of the country, for which they had several times before applied for and obtained the king's licence; but, after the passing of certain acts of parliament, having, upon application to the commissioners of the customs at Glasgow, been informed (erroneously as it afterwards appeared) that such licences were no longer necessary, they had omitted to obtain one on that occasion, in consequence of which, the cargo being taken was condemned as prize, on the general ground, that all trading with an enemy, without the king's licence, was illegal and a cause of confiscation. And in the case of *Potts* v. *Bell*, a British

subject shipped from the enemy's country, on board a neutral ship, goods which he had purchased of the enemy during hostilities, and it was decided, that an insurance upon such cargo was illegal and void. These cases show, that there is no distinction between trading with an enemy and with an enemy's country, and that aid is considered as being equally given to the enemy, whether goods be furnished immediately by the enemy, or through the medium of a neutral merchant, and that the danger of a traitorous correspondence is the same.

This strict exclusion of trade between belligerents has been carried so far as to prohibit a remittance of supplies even to a British colony, during its temporary subjection to an enemy. This extreme point is established by the case of *The Bella Guidita* (1 Robinson, 207). In that case, Grenada, a British possession, had been seized by the French, but by the public acts, both of France and of this country, it appeared, that the island was not considered to have entirely changed its national character; the French having made ordinances with respect to it, which they would not have made in the case of an island strictly French, and the British legislature having even enacted, in the 20th year of Geo. 3, that it being just and expedient to give every relief to the proprietors of estates there, no goods of the produce of Grenada, on board neutral vessels going to neutral ports, should be liable to condemnation as prize. Notwithstanding all these evidences, that the character of Grenada was not to be considered strictly hostile, notwithstanding even the express permission to export the produce of that island, a neutral vessel sent from England with goods

to be imported into Grenada was seized, as employing itself in an illicit intercourse with the enemy, and condemned in the Vice-Admiralty Court of Barbadoes; upon appeal to the privy council by the proprietors of the cargo, the sentence was affirmed. "During a conjoint war, no subject of one belligerent can trade with the enemy, without being liable to a forfeiture of his property, engaged in such trade, in the Courts of the ally." (Lord Stowell, *The Nayade*, 4 Robinson, 251.)

The same rule is strictly applied by the American courts. *The Rapid* (8 Cranch, 155) was the case of an American citizen who had purchased goods in the British territory prior to the commencement of hostilities between the United States and Great Britain, and had deposited them on an island near the frontier; upon the breaking out of hostilities his agents had hired a vessel to bring away the goods; on her return she was captured, and with her cargo condemned. The Supreme Court in confirming the condemnation said, "that whatever relaxations of the strict rights of war, the more mitigated and mild practice of modern times might have established, there had been none on this subject. The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse between the states at war. The whole nation is embarked in one common bottom and must be reconciled to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because he is the enemy of his country. It is no excuse for such trading with the enemy that the property was pur-

chased before the war, much less that the goods only, and not the purchase, existed before the war in the enemy's country. (*The Lawrence and cargo*, 1 Gallison, 470; *The Alexander and cargo*, ib. 532; *The Mary*, ib. 620; *The Joseph*, ib. 545.) If an American vessel take on board a cargo from an enemy's ship, under pretence of ransom, it is a trading with the enemy, and the vessel may be seized as prize of war, as well after she has discharged the cargo, and on her return voyage, as before. (*The Lord Wellington*, 2 ib. 103.)

It is a trading with the enemy when a vessel owned by American citizens is captured by the enemy, carried into his port, libelled in his courts, and afterwards acquitted on an enemy's licence, under which he was sailing; and has then purchased a cargo in the enemy's country with which he is sailing for his home port. (*The Alexander*, 8 Cranch, 169.)

The rule which prohibits commerce with the enemy is enforced with peculiar strictness in the case of ships of *truce or cartel ships*. "The conduct of ships of this description," says Lord Stowell (*The Venus*, 4 Robinson, 357,) "cannot be too narrowly watched. The service on which they are sent is so highly important to the interests of humanity, that it is peculiarly incumbent on all parties to take care that it should be conducted in such a manner as not to become a subject of jealousy and distrust between the two nations." *The Venus* was a British vessel, which had gone to Marseilles, under cartel, for the exchange of prisoners. She had there taken a cargo on board, and was stranded and captured on a voyage to Port Mahon. Lord Stowell condemned her, on a full view of the cir-

cumstances of the case, adding these further remarks, which are applicable to all other cases of cartel ships trading with the enemy: "It is not a question of gain, but one on which depends the recovery of the liberty of individuals, who may happen to have become prisoners of war; it is therefore a species of navigation which, on every consideration of humanity and policy, must be conducted with the most exact attention to the original purpose, and to the rules which have been built upon it; since, if such a mode of intercourse is broken off, it cannot but be followed by consequences extremely calamitous, to individuals of both countries. Cartel ships are subject to a double obligation to both countries not to trade. To engage in trade may be disadvantageous to the enemy, or to their own country. Both are mutually engaged to permit no trade to be carried on under a fraudulent use of this intercourse; all trade must therefore be held to be prohibited, and it is not without the consent of both governments, that vessels engaged in that service can be permitted to take in any goods whatever."

"The employment to which the privilege of cartel is allowed, is of a very peculiar nature," said Lord Stowell; "it is a mode of intercourse between hostile nations, invented for the purpose of alleviating, in some degree, the calamities of war, by restoring to their liberty those individuals who may happen to have fallen into a state of captivity. It is the mutual exchange of prisoners of war; and, therefore, properly speaking, it can have place between belligerents only." (*The Rose in Bloom*, Dodson, 60; see also *The Carolina Verhage*, 6 Rob. 336.)

When a ship claims to be going as a cartel, the nature of the vessel does not appear to be material. Even without a certificate of cartel on board, so that she appears to be *bonâ fide* on a voyage for the purpose of bringing prisoners, she ought not to be condemned, and the protection extends to the return voyage. (*The Diaffie*, 3 Rob. 139; *La Gloire*, 5 Rob. 192.) A ship going to be employed as a cartel ship is not protected by mere intention on her way from one port to another of her own country, for the purpose of taking on herself that character when she arrives at the latter port. If such necessity occurs, it is proper to apply to the commissary of prisoners in the enemy's country for a pass. (*The Diaffie*, ib. 143.) All contracts made for equipping and fitting cartel ships are to be considered as contracts between friends, and consequently to be enforced in the tribunals of either belligerent. Such vessels are considered neutral licensed vessels, and all persons connected with their navigation, upon the particular service in which both belligerents have employed her, are neutral in respect of both, and under the protection of both. (*Crawford* v. *The William Penn*, Peters, 106.) Persons put on board a cartel with their own consent, by the government of the enemy, to be carried to their own country, are bound to do no act of hostility. Therefore, a capture made by such persons of a vessel of their own country from the enemy, is not a re-capture in contemplation of law, and gives them no title to salvage, and the former owner no title to claim the vessel. (*The Mary Folger*, 5 Rob. 200.) Tin plates for canister shot, put on board a cartel ship by a British manufac-

turer, were condemned as droits of Admiralty. (*La Rosine*, 2 Rob. 372.)

The rule which renders it illegal for a British subject to carry on commerce with an enemy, also precludes an ally from similar intercourse. "It is well known," said Lord Stowell (*The Neptune*, 6 Rob. 405), "that a declaration of hostility naturally carries with it an interdiction of all commercial intercourse; it leaves the belligerent countries in a state that is inconsistent with the relations of commerce. This is the natural result of a state of war, and it is by no means necessary that there should be a special interdiction of commerce to produce this effect. At the same time it has happened, since the world has grown more commercial, that a practice has crept in, of admitting particular relaxations, and if one state only is at war, no injury is committed to any other state. It is of no importance to other nations how much a single belligerent chooses to weaken and dilute his own rights; but it is otherwise when allied nations are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express, contract, that one state shall not do anything to defeat the general object. If one state admits it subjects to carry on an uninterrupted trade with the enemy, the consequence may be, that it will supply that aid and comfort to the enemy, especially if it is an enemy depending, like Holland, very materially on the resources of foreign commerce, which may be very injurious to the prosecution of the common cause, and the interests of its ally. It should seem, that it is not enough therefore to say, that the one state has allowed this practice to its own subjects; it should appear to be at least de-

sirable that it could be shown, that either the practice is of such a nature as can in no manner interfere with the common operations, or that it has the allowance of the confederate state."

A fictitious destination will in no degree operate to save persons from the penalty of trading with the enemy. In *The Jonge Pieter* (4 Rob. 79), an attempt was made to protect a cargo shipped in England, and ultimately destined for an enemy's market, by dividing the voyage, and directing the cargo to be taken, in the first instance, to a neutral port, from whence it might or might not be afterwards carried forward to the place of its real destination, the enemy's market. But Lord Stowell condemned it to the captors. "Without the licence of government, no communication, direct or indirect, can be carried on with the enemy. Where no rule of law exists, a sense or feeling of general expediency, which is, in other words, common sense, may fairly be applied; but where a rule of law interferes, these are considerations to which the court is not at liberty to advert. In all the cases that have occurred on this question, and they are many, it has been held indubitably clear, that a subject cannot trade with the enemy without the special licence of government. The interposition of a prior port makes no difference; all trade with the enemy is illegal, and the circumstance, that the goods are to go first to a neutral port, will not make it lawful. The trade is still liable to the same abuse, and to the same political danger, whatever that may be."

The intervention of third persons will not protect a cargo in trade with the enemy. Thus, in the case of *The Samuel* (4 Rob. 284, 8 Term R. 548) it was de-

cided that if an English subject employs a neutral to purchase for him in the country of the enemy, the neutral is in such case but the mere agent; the goods must then be considered to pass immediately from the enemy to the British subject, and such a transaction would be illegal. If a neutral merchant has, *bonâ fide*, purchased a vessel lying in an enemy's port, he may dispose of her as freely as if she were on the seas, and the locality of the ship will not affect the legality of the sale.

The allegation of partnership will not be allowed to save individuals from the consequences of commerce with the enemy. In *The Franklin* (6 Rob. 131), which was a case of trade carried on with the enemy, by a firm consisting partly of neutrals and partly of British subjects, Lord Stowell said:—"It has been decided, that even an inactive, or sleeping partner as it is termed, cannot receive restitution in a transaction in which he could not lawfully be engaged as a sole trader."

The rule thus rigidly enforced in the Admiralty Courts prevails to the same extent in the Courts of Common Law. The cases of *Gist* and *Mason* (1 Term Reports, 84), and *Bell* and *Gilson* (1 Bos. & Pul. 245), had, indeed, left the question in much perplexity; but the uniformity of decision between both tribunals was definitively established by Lord Kenyon, in the case of *Potts* v. *Bell*, in error (8 Term R. 548). His Lordship said, "That the reasons urged, and the authorities cited, were so many, so uniform, and so conclusive, to show that a British subject's trading with an enemy was illegal, that the question might be considered finally at rest, and that it was needless to delay

giving judgment for the sake of pronouncing the opinion of the court in more formal terms."

Trade with the enemy is as illegal by land as by water. There is an authority in Rolle's Abridgment, 173, showing that it was anciently deemed illegal to trade with Scotland, then in a general state of enmity with this kingdom; and in the case of *The Hoop*, Lord Stowell, referring to this note in Rolle, declares, "What the common law of England may be, it is not necessary, nor, perhaps, proper for me to inquire; but it is difficult to conceive that it can, by any possibility, be otherwise, for the rule in no degree arises from the transaction being upon the water, but from principles of public policy and of public law, which are just as weighty on the one element as on the other, and of which the cases have more frequently happened upon the water, merely in consequence of the insular situation of this country."

The case of *The Abby* (5 Robinson, 251) shows, that the Court of Admiralty has not been disposed to force the rule beyond its true spirit. A ship sailed on the 11th September, 1795, for the island of Demerara, then a Dutch colony. War being declared, on the 16th of the same month, against Holland, Demerara became, of course, a hostile possession. The ship was captured off its coast, in May, 1796; but the island having in the meantime surrendered to the British forces, had become a British colony. Lord Stowell held, that as the port to which the ship was destined did, at the time of her carrying the design into effect, belong, not to an enemy, but to his Britannic Majesty, the ship was not to be deemed in fact an illegal trade. "I conceive," said he, "that

there must be an act of trading to the enemy's country, as well as the intention; there must be, if I may so speak, a legal as well as a moral illegality. If a man fires a gun at sea, intending to kill an Englishman, which would be legal murder, and by accident does not kill an Englishman, but an enemy, the moral guilt is the same, but the legal effect is different; the accident has turned up in his favour, the criminal act intended has not been committed, and the man is innocent of the legal offence. So, if the intent was to trade with an enemy (which I have already observed cannot be ascribed to the party at the commencement of the voyage, when hostilities were not yet declared), but at the time of carrying the design into effect, the person is become not an enemy; the intention here wants the *corpus delicti*. No case has been produced in which a mere intention to trade with the enemy's country, contradicted by the fact of its not being an enemy's country, has enured to condemnation. Where a country is known to be hostile, the commencement of a voyage towards that country may be a sufficient act of illegality; but where the voyage is undertaken without that knowledge, the subsequent event of hostility will have no such effect. On principle, I am of opinion, that the party is free from the charge of illegal trading." (See also *The De Bilboa*, 2 Rob. 133.)

The rule against trading with the enemy applies of strict right even to British property that has left the enemy's country after the declaration of hostilities. It was, indeed, at one time held, that if an Englishman, at the commencement of hostilities, had goods in an enemy's country, he might bring them away. But it seems that the case of *Potts and Bell* (8 T. R. 548) has reversed that, as well as most of the other doctrines

laid down in *Bell and Gilson*. The doctrine is established by a decision quoted in *Potts and Bell*, from a manuscript note of Sir Edward Simpson, in the case of *St. Philip*, at the Cockpit, wherein it was established that trading with an enemy is a subject of confiscation, and excludes any exception, even on the ground that the goods had been purchased before the war. This authority, with all the others cited by the king's advocate in the case of *Potts and Bell*, received the general sanction of Lord Kenyon in delivering the judgment of the court.

At the same time, in cases of hardship, the courts have not shown themselves unwilling to make some relaxations. In the case of *The Dree Gebroeders* (4 Robinson, 234), Lord Stowell observed, "That pretences of withdrawing funds are at all times to be watched with considerable jealousy; but, when the transaction appears to have been conducted *bonâ fide* with that view, and to be directed only to the removal of property, which the accidents of war may have lodged in the belligerent country, cases of this kind are entitled to be treated with some indulgence." But in the case of *The Juffrow Catharina* (5 Robinson, 141), a case where an indulgence was allowed by the court, for the withdrawal of British property, Lord Stowell intimated that his decree in that instance was not to be understood as in any degree relaxing the necessity of obtaining a licence. "On the contrary, this court cannot sufficiently inculcate the only way of applying in all cases for the protection of a licence, when property is to be withdrawn from the country of the enemy; it is, indeed, the only safe way in which a party can proceed."

In the case of *The Madonna delle Grazie* (14

Robinson, 195), some degree of relaxation was undoubtedly admitted, but it was admitted under very peculiar circumstances, which, though certainly infractions of the letter, yet by no means contravened the spirit of the rule. The goods in question, which were wines purchased solely for the supply of the British fleet before hostilities with Spain, were secretly deposited in that country after the breaking out of the war, and then removed to Leghorn, with an addition of some other newly purchased wines mixed in order to colour the previous stock, which had become too pale to be saleable by itself. The mixture of the new wine, which had been purchased subsequently to hostilities, was considered by Lord Stowell so indispensably necessary to the disposal of the old cargo, as not to affect the legality of the transaction. His judgment then proceeds in the following words:—"It is said that Mr. Gregory, the claimant in this case, might have obtained a licence; I certainly do not mean to weaken the obligation to obtain licences for every sort of communication with the enemy's country, in all cases where the measure is practicable; but, I think, I see great difficulties that might have occurred in applying for a licence, or in using it in the present case. How could Mr. Gregory describe his wines, as to the place from whence they would be exported? They were deposited secretly, and could only be exported by particular opportunities. On the other hand, can I entertain a doubt that government would have been very desirous to protect him in the recovery of this property, purchased under a contract with them? Or, on the ground of public utility, is it too much to hold out this encouragement to persons engaged in contracts of

this sort, that they shall obtain every facility in disposing of such stores? It would be a considerable discouragement to persons in such situations, at a distance from home, and employed in the public service, if they were to know, that in case of hostilities intervening, they would be left to get off their stores as well as they could, with a danger of capture on every side. The circumstances of this case may be taken as virtually amounting to a licence, inasmuch as if a licence had been applied for, it must have been granted."

Commerce by a person resident in an enemy's country, even as representative of the crown of this country, is illegal, and the subject of prize, however beneficial it may be to this country, unless authorized by licence. (*Ex parte Baglehole*, 18 Ves. jun. 528; 1 Rose, 271.)

Debts due by British subjects to subjects of the enemy's state, are during the war, withheld. "When Alexander," writes Vattel, Book 3, c. 5, s. 77, "became by conquest master of Thebes, he found, among the treasures of the conquered, an engagement from the Thessalians to pay a hundred talents. The Thessalians having served with merit in his army, he gave up the engagement to them, and thus remitted the debt. So the sovereign has naturally the same right over what his own subjects may owe to enemies. He may, therefore, confiscate debts of this nature, if the term of payment happen in time of war; or at least, he may prohibit his subjects from paying while the war continues." The latter course has been adopted by the British law. We suspend the right of the enemy to the debts which our traders may owe to him, but we do not annul it; we preclude him, during war, from suing to recover

his due; for we are not to send treasure abroad for the direct supply of our enemies in their attempts to destroy us; but, with the return of peace, return the right and the remedy.

The case of *The Hoop* (*supra*, p. 5) comprehends, in one concise view, not only the law of nations respecting the power of withholding payment from an enemy of the debts that may be due to him, but the rule of our own law also, with the exceptions which it admits.

The law with regard to the payment of debts due to the enemy, at the return of peace, is given in *Ex parte Boussmaker* (13 Ves. jun. 71). There a petition came on in the Court of Chancery, in the matter of Boussmaker, a bankrupt, praying, that the petitioner might be admitted to prove, under the commission, a debt which the commissioners had refused to admit, upon the objection that the creditors, applying to prove, were alien enemies. The Lord Chancellor explained the distinctions of the law and its principles on the important question, whether the right of an alien enemy was destroyed or only suspended by war. "If this," said his Lordship, "had been a debt, arising from a contract entered into with an alien enemy during war, it could not possibly stand, for the contract would be void; but if the two nations were at peace at the date of the contract, though, from the time of war taking place, the creditor could not sue, yet the contract being originally good, upon the return of peace the right would revive: it would be contrary to justice, therefore, to confiscate this dividend. Though the right to recover is suspended, that is no reason why the fund should be divided among the other creditors. The

point is of great moment, from the analogy to the case of an action. The policy avoiding contracts with an enemy is sound and wise; but where the contract was originally good, and the remedy is only suspended, the proposition that therefore the fund should be lost, is very different." According to the strictness of the law of nations, we have already seen that debts due to alien enemies may be confiscated by the state. But in England, and in some other modern states, a milder law appears to have been established—a law which, though in no way compulsory with regard to foreign nations, is binding upon the crown in this particular country. An old case, indeed, of the *Attorney-General* v. *Weedon and another* (Parker's Reports, 207), seems to countenance the prerogative of the British crown in all the rigour of the old law of nations, but that doctrine is questioned by Rolle, in his Abridgment; and in the case of *Furtado* v. *Rogers* (3 Bos. & Pul. 191), Lord Alvanley said, "With respect to the argument, that all contracts made with the enemy enure to the benefit of the king during war, and that he may enforce payment of any debt due to an alien enemy from any of his subjects, we think it is not entitled to much weight. Such a course of proceeding never has been adopted, nor is it very probable that it ever will be adopted, as well from the difficulties attending it, as from the disinclination to put in force such a prerogative." As between Great Britain and the United States, the 10th article of the treaty of 1794 prohibits the confiscation of enemy's property found in the country at the beginning of a war, as to debts and money in the funds and banks, on the principle that because property on arrival at a particular place would

have been liable for confiscation, it is not therefore to be treated as if it had arrived and been confiscated." The right to confiscate debts so due to enemy's subjects, though a strictly national right, is so justly deemed odious in modern times, and is so generally discountenanced, that in the United States it is held that nothing but an express act of the legislature could include it in the objects of warfare. (*The Ann Green*, 1 Gallison, 292.)

"The claim of a right to confiscate debts," says Chancellor Kent (i. 71), "contracted by individuals in time of peace, and which remain due to the subjects of the enemy at the declaration of war, rests very much upon the same principles as that concerning enemy's tangible property, found in the country at the opening of the war. In former times, the right to confiscate debts was admitted as a doctrine of national law, and (Grotius, B. 1, c. 1, s. 6; b. 3, c. 8, s. 4; Puffendorf, l. 8, c. 6, 19, 20; Bynkershoeck, l. 1, cap. 7, and Lord Hale, 1, 95) pronounced in favour of it. It had the countenance of the civil law (Dig. 41, 1; 49, 15); and even Cicero (Off. l. 3, c. 26), when stating the cases in which promises are not to be kept, mentions that of the creditor becoming the enemy of the country of the debtor. Down to the year 1737, the general opinion of jurists was in favour of the right; but Vattel says (B. 3, c. 5, s. 77) that a relaxation of the rigour of the rule has since taken place among the sovereigns of Europe, and that as the custom has been generally received, he who should act contrary to it would violate the public faith; for strangers trusted his subjects only from a firm persuasion that the general custom would be observed. There has been

frequently a stipulation in modern treaties, that debts or monies in the public funds should not be confiscated in the event of war; and these conventional provisions are evidence of the sense of the governments which are parties to them, and that the right of confiscation of debts and things in action is against good policy and ought to be discontinued. The treaties between the United States and Columbia in 1825, and Chili, in 1832, and Venezuela in 1836, and the Peru-Bolivian confederation in 1838, and of Ecuador, in 1839, contained such a provision; but the treaty between the United States and Great Britain in 1795 went further, and contained the explicit declaration, that it was 'unjust and impolitic that the debts of individuals should be impaired by national differences.' Vattel says (*ubi supra*) that everywhere money lent to the public is exempt from confiscation and seizure in case of war." Emerigon (*Des Ass.* i. 567) and Martens (B. 8, c. 2, s. 5) make the same declaration. With regard to the United States, however, the cases of *Brown* v. *The United States* (8 Cranch, 110, and *Ware* v. *Hilton*, 3 Dallas 199,) establish it as a principle of public law, so far as the same is understood and declared by the highest judicial authorities in that country, that it rests in the discretion of the legislature of the Union, by a special law for that purpose, to confiscate debts contracted by its citizens and due to the enemy, though, as it is asserted by the same authority, this right is contrary to universal practice, and may, therefore, well be considered as a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times. (Kent, *ubi supra.*)

COMMERCE OF THE ENEMY.

The commerce of the enemy has in all ages been considered as the legitimate prize of war. There is no such thing as a war for arms, and a peace for commerce. The rights of war, as they may be lawfully exercised against hostile commerce, are discussed at large in the Third Book of Grotius, c. 6. A state taking up arms in a just cause has a double right against her enemy: first, a right to obtain possession of her property withheld by the enemy; to which must be added the expenses incurred in the pursuit of that object, the charges of the war, and the reparation of damages—for were she obliged to bear those expenses and losses, she would not fully recover her property or obtain her due; secondly, she has a right to weaken her enemy, in order to render him incapable of supporting his unjust violence,—a right to deprive him of the means of resistance. Hence, as from this source originate all the rights which war gives us over things belonging to the enemy, we have a right to deprive him of his possessions, of everything which may augment his strength and enable him to make war. This every one endeavours to accomplish in the manner most suitable to him. Whenever we have an opportunity, we seize on the enemy's property, and convert it to our own use; and thus, besides diminishing the enemy's power, we augment our own, and obtain at least a partial indemnification or equivalent either for what constitutes the subject of the war or for the expenses and losses incurred in its prosecution; in a word, we do ourselves justice.

The doctrines laid down in these and in other treatises on international law, are thus condensed by Martens (Book 3, c. 3, s. 9): "The conqueror has a right to seize on the property of the enemy, whether moveable or immoveable. These seizures may be made, first, in order to obtain what he demands as his due, or an equivalent; secondly, to defray the expenses of the war; thirdly, to force the enemy to an equitable peace; fourthly, to deter him, or, by reducing his strength, to hinder him from repeating in future the injuries which have been the cause of the war. And, with this last object in view, a power at war has a right to destroy the property and possessions of the enemy, for the express purpose of doing him mischief. However, the modern laws of war do not permit the destruction of any thing, except, first, such things as the enemy cannot be deprived of by any other means than those of destruction, and which it is at the same time necessary to deprive him of; secondly, such things as, after being taken, cannot be kept, and which might, if not destroyed, strengthen the enemy; thirdly, such things as cannot be preserved without injury to the military operations. To all these we may add, fourthly, whatever is destroyed by way of retaliation." Vattel, however, qualifies this rule by exempting from seizure and confiscation real property (*immeubles*) held by the enemy's subjects within the belligerent state, which, having been acquired by the consent of the sovereign, is to be considered as on the same footing with the property of his own subjects, and not liable to confiscation *jure belli*. But he adds, that the rents and profits may be sequestrated, in order to prevent their being remitted to the enemy.

The first mode by which a belligerent proceeds to assail the commerce of his enemy is by embargo, the effect of which is to detain vessels in the ports where they may be lying. Embargoes, which are imposed on various occasions and for various purposes, are of two descriptions, warlike or civil. The former is imposed by a nation upon such foreign vessels within her ports as belong to states against whom she has declared war, or is about to declare it. Vattel lays it down as a rule that a nation is not at liberty to seize that part of her enemy's property which is in her dominions at the time of the declaration, because it came into her power upon the faith of previously existing peace. But declarations of war are not construed to take effect merely from the time when a formal notification of hostility is given; there are certain preceding acts, of a hostile nature, which are deemed to be virtually declarations of war, to certain intents and purposes, though they may be explained away and annulled by a subsequent accommodation between the governments. When, therefore, a nation receives certain injuries, for which she sees no prospect of obtaining redress, she is reduced to consider hostilities as virtually declared, and issues an embargo upon the commerce of the offending state then lying within her ports, in order to indemnify herself in the only way in which, perhaps, it may be possible for her to obtain indemnification at all. In this case, the hostile property, which comes to her hands after the commission of the injury, may be, and is regarded, as having come to her hands after the declaration of hostilities, though that declaration have not been duly and formally notified; and, therefore,

the case of embargo is not within the prohibition of Vattel, which reaches to the exemption only of goods in our hands at the time of the declaration, and does not cover property coming into our territory after that declaration, whether such declaration be only virtual, or whether it be announced with all the fulness of formality. If in the ports of this kingdom, an order of Council puts a general embargo on the ships of any foreign state, and reprisals afterwards take place, it is not contended that such vessels would not be condemnable as prize to the king *jure coronæ*. *The Overyssel* was a case of that description, and no question was raised about it; it passed, in a manner *sub silentio*, as a matter of common condemnation, and no observation was made upon it, but many material distinctions seem to render that case no authority on the present question. That ship was detained on an embargo laid on the ports of this kingdom, and operating therefore with just force and authority to produce its effect; but no embargo issuing in this country can operate with any effect, beyond the limits of the realm; it is a mere nullity as to other countries.

In *The Boedes Lust* (5 Rob. 246), an embargo had been laid upon Dutch property, by Great Britain, previously to an open declaration of war, but under such circumstances of injustice on the part of Holland, as were considered by the British Government as amounting to an implied declaration of war; and the formal declaration, which afterwards supervened, was deemed to have a retrospective effect, confirming all that had been done by an embargo under the implied declaration. "The seizure," said Lord

Stowell, "was at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, so terminated. That would have been the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character upon the original seizure; it is declared to be embargo; it is no longer an equivocal act subject to no two interpretations: there is a declaration of the *animus* by which it was done; that it was done *hostili animo*, and is to be considered as a hostile measure *ab initio*. The property taken is liable to be used as the property of persons trespassers *ab initio*, and guilty of injuries which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities." (See also *The Herstelder*, 1 Rob. 114.)

As warlike embargoes are enforced against enemies, so civil embargoes are employed in the case of allies and subjects. "The civil embargo," says Beawes, (Lex Mercatoria, 271,) "is laid on ships and merchandize in the ports of this kingdom, by virtue of the king's proclamation, and is strictly legal, when the proclamation does not contravene the ancient laws, or tend to establish new ones, but only to enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary." "The law," says Blackstone (i. 7), "is, that the king may prohibit any individual of his subjects from leaving the kingdom. A proclamation, therefore, forbidding this,

in general for three weeks, by laying an embargo upon all shipping in time of war, will be equally binding with an act of parliament, because founded on a prior law." (See also 4 Mod. 177—179; Skinner, 93, 335; 1 Salk. 32; 3 Inst. 162.)

But this civil embargo cannot be imposed upon British ships in a foreign port, unless by the concurring authority of the state to which that port belongs; for the king has no right to disturb the peace of neighbouring nations by any seizures, however useful to the interests of his own people. This principle is established by Lord Stowell, in *The Gertruyda* (2 Rob. 211). "In the first place, it is not necessary that the embargo should be exactly of the same nature, in order to vest the rights of the Crown; for any mode of forcible occupancy or detainer, prior to hostilities, is sufficient for the purpose." Even within the jurisdiction of this kingdom, the prerogative of the sovereign, with respect to the imposition of embargoes, is of a nature by no means unlimited, or absolute. Among the many reports that are to be found, of the great case of *Sands* v. *East India Company*, there is one in Salkeld, p. 32, where it is set down as agreed, that the king may lay embargoes; but then it must be for the public good, and not for the private advantage of a particular trader or company; and the embargo which was issued by his majesty to prevent the exportation of corn in 1766, is noticed by Beawes (Lex Mercatoria, p. 276), as having been illegally imposed, "Such exportation," says he, "being allowed by law at the time;" and, therefore, the preamble to the stat. 7 Geo. 3, c. 7, for indemnifying all persons advising or acting under the order of council laying an embargo on all ships

laden with corn, or flour, during the recess of parliament in 1766, says, "which order could not be justified by law, but was so much for the service of the public, and so necessary for the safety and preservation of his majesty's subjects, that it ought to be justified by act of parliament." This embargo, as was allowed, saved the people from famine; yet it was declared illegal by the above act of the legislature, including the king himself, who laid it, which was therefore needful to sanction it; and the proprietors of the embargoed ships and cargoes were accordingly indemnified by government.

The practice so common in modern Europe, of imposing embargoes, has apparently the effect of destroying that protection to property, which the rule of faith and justice gives to it, when brought into the country in the course of trade and in the confidence of peace. The seizure, however, though hostile in the execution, should the matter in dispute terminate in reconciliation, becomes a mere civil embargo; it is only when hostilities proceed that the embargo takes effect, as a hostile measure, *ab initio*. Embargo is laid down in the best authorities as a lawful measure, sanctioned by the uniform usage of nations. It does not differ in substance from the conduct of the Syracusans, in the time of Dionysius the elder—which Mitford considered to be a gross violation of the law of nations—who, having declared war against Carthage, at once seized the effects of Carthaginian traders in their warehouses, and Carthaginian vessels in their harbours, and then sent a herald to Carthage to negotiate. This act of the Syracusans is identical with the ordinary practice in England, as laid down by Lord

Mansfield, in *Lindo* v. *Rodney* (Doug. 613): "Upon the declaration of war or hostilities, all the ships of the enemy are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made." (Kent, 68.)

The following is her Majesty's proclamation, ordering a general embargo on Russian vessels in the English ports:—

"At the Court at Buckingham Palace, the 29th day of March, 1854,

"Present—The Queen's Most Excellent Majesty in Council.

"It is this day ordered by her Majesty, by and with the advice of her Privy Council, that no ships or vessels belonging to any of her Majesty's subjects be permitted to enter and clear out for any of the ports of Russia until further order; and her Majesty is further pleased to order that a general embargo or stop be made of all Russian ships and vessels whatsoever, now within, or which shall hereafter come into, any of the ports, harbours, or roads, within any of her Majesty's dominions, together with all persons and effects on board the said ships or vessels; provided, always, that nothing herein contained shall extend to any ships or vessels specified or comprised in a certain Order of her Majesty in Council, dated this twenty-ninth day of March, for exempting from capture or detention Russian vessels under special circumstances; her Majesty is pleased further to order, and it is hereby ordered, that the utmost care be taken for the preservation of all and every part of the cargoes on board any of the said ships or vessels, so that no damage or embezzlement whatever be sustained; and the Right

Hon. the Lords Commissioners of her Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain. "C. C. GREVILLE."

With reference to Russian merchant ships in her Majesty's East Indian territories, or within her Majesty's foreign and colonial possessions, the following proclamation has been issued:—

"At the Court at Buckingham Palace, the 7th day of April, 1854.

"Present—The Queen's Most Excellent Majesty in Council.

"Her Majesty being compelled to declare war against his Imperial Majesty, the Emperor of all the Russias, and being desirous to lessen as much as possible the evils thereof, is pleased, by and with the advice of her Privy Council, to order, and it is hereby ordered, that Russian merchant vessels which, at the time of the publication of this order, shall be in any ports or places in her Majesty's Indian territories, under the government of the East India Company, or within any of her Majesty's foreign or colonial possessions, shall be allowed thirty days from the time of the publication of this order in such Indian territories, or foreign or colonial possessions, for loading their cargoes, and departing from such ports or places; and that such Russian merchant vessels, if met at sea by any of her Majesty's ships, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; provided that nothing herein contained shall extend

or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian Government.

"And it is hereby further ordered by her Majesty, by and with the advice of her Privy Council as aforesaid, that any Russian merchant vessel which, prior to the 29th of March now last past, shall have sailed from any foreign port, bound for any port or place, in any of her Majesty's East Indian territories, or foreign or colonial possessions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

"And the Right Honourable the Lords Commissioners of her Majesty's Treasury, the Lords Commissioners of the Admiralty, and her Majesty's Principal Secretary of State for War and the Colonies, the Right Honourable the Commissioners for the Affairs of India, and all governors, officers, and authorities whom it may concern, in her Majesty's East Indian, foreign, and colonial possessions, are to give the necessary directions herein as to them may respectively appertain.

"C. C. GREVILLE."

REPRISALS.

The doctrine as to embargoes preceding hostilities, is not peculiar to the British courts. Its principle has been acknowledged amongst all nations, and forms the basis of reprisals. "Reprisals," says Vattel (B. 2, c. 18, s. 342), "are used between nation and nation, in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another,—if she refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it,—the latter may seize something belonging to the former, and apply it to her own advantage, till she obtains payment of what is due to her, together with interest and damages; or keep it as a pledge till she has received ample satisfaction. In the latter case, it is rather a stoppage, or a seizure, than reprisals; but they are frequently confounded in common language. The effects thus seized on are preserved while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears, they are confiscated, and then the reprisals are accomplished. If the two nations, upon this ground of quarrel, come to an open rupture, satisfaction is considered as refused from the moment that war is declared, or hostilities commenced; and then also the effects seized may be confiscated."

"In reprisals," continues the same author, "we seize on the property of the subject, just as we would on that of the state, or sovereign. Everything that belongs to the nation is subject to reprisals, whenever it can be seized, provided it be not a deposit entrusted

to the public faith. As it is only in consequence of that confidence which the proprietor has placed in our good faith, that we happen to have such a deposit in our hands, it ought to be respected, even in case of open war; such is the conduct observed in England, and elsewhere, with respect to the money which foreigners have placed in the public funds."

He who makes reprisals against a nation, cannot be taxed with seizing the property of an innocent person for the debt of another; for in this case the sovereign is to compensate those of his subjects on whom the reprisals fall; it is the debt of the state or nation of which each citizen ought only to pay his quota.

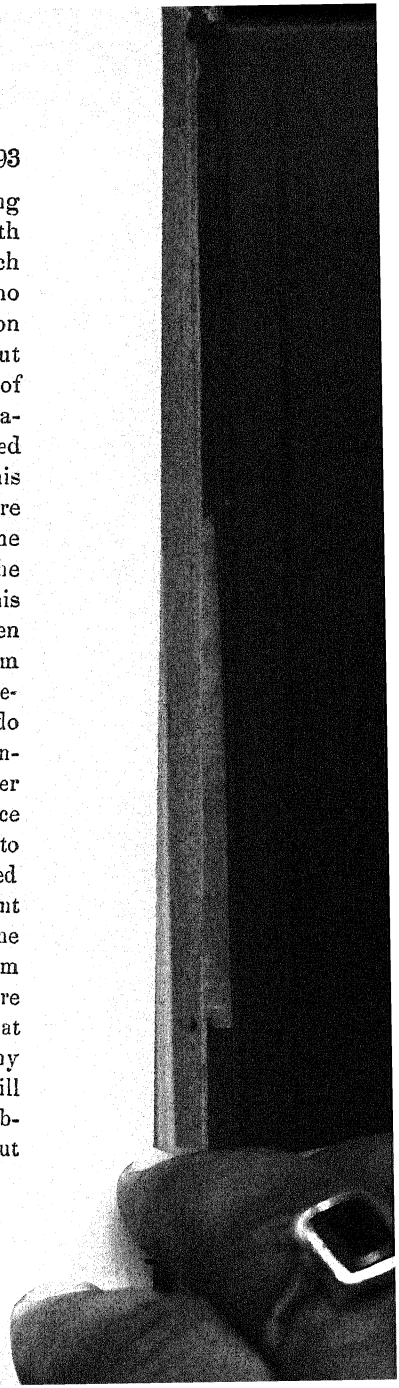
The sovereign alone can order reprisals. It is only between state and state that all the property of the individuals is considered as belonging to the nation. Sovereigns transact their affairs between themselves; they carry on business with each other directly, and can only consider a foreign nation as a society of men who have but one common interest. It belongs therefore to sovereigns alone to make and order reprisals. It is an affair of too serious a nature to be left to the discretion of private individuals, and accordingly we see that, in every civilized state, a subject, who thinks himself injured by a foreign nation, has recourse to his sovereign in order to obtain permission to make reprisals." (Vattel, B. 2, c. 18.) Reprisals may be made in support of the rights of a subject as well as of those of the sovereign, and for the acts of the subject as well as for those of the sovereign, but in neither case should the commission or letter of marque be issued except in a case clearly

just and undoubted. The property so seized may be detained as a pledge, or disposed of under judicial sanction, in like manner, as if it were a process of distress under national authority for some debt or duty withheld. The right of government to enforce these just claims of its subjects against a foreign government, by reprisals, if relief be denied by the foreign court, is clearly laid down by Viscount Palmerston in his able speech of the 6th of July, 1847, on the motion made by the late Lord George Bentinck, "that an humble address, be presented to her Majesty, praying her Majesty to take such steps as her Majesty may be graciously pleased to deem advisable to secure for the British holders of unpaid Spanish bonds redress from the Government of Spain."

Viscount Palmerston said—"My noble friend has quoted passages from the law of nations, laying down the doctrine that one government is entitled to enforce from the government of another country redress for all wrongs done to the subjects of the government making the application for such redress; and that if redress be denied, it may justly be obtained by reprisals from the nation so refusing. I fully admit to this extent the principle which my noble friend has laid down. At the same time, I am sure the House will see that there may be a difference and distinction drawn in point of expediency and in point of established practice, as to the application of an indisputable principle to particular and different cases. Now, if the government of Spain had, we will say, for example, violently seized the property of British subjects, this country being on terms of amity with Spain, under treaties, no man will, for a moment, hesitate in declaring that it

would be the duty of the government of Great Britain to enforce redress. In the same manner, in any transaction that is founded on previous compacts between two governments—in any transaction that is founded on the previous sanction of the government whose subject is the complainer, in any case of that sort, it has been the practice of Great Britain to demand and insist upon redress. Again, if any act of injustice, in the prosecution of trade and commerce, be inflicted on British subjects, there can be no question as to the course which the government of this country ought to pursue. But there has always been drawn a distinction between the ordinary transactions of British subjects with the subjects of other countries, and the transactions of British subjects with the governments of other countries. When a British subject, engaged in trade with the subjects of a foreign country, sustains a loss, his first application is to the law of that country for redress. If those laws are not properly administered in his case, then the British government steps in and demands either that the law shall be properly dealt out, or that redress shall be given by the government of that state. It is to the advantage of this country to encourage commercial dealings with foreign countries; but I do not know that it is to the advantage of this country to give great encouragement to British subjects to invest their capital in loans to foreign countries. I think it is inexpedient for many reasons that that course should be pursued. It exposes British subjects to loss from trusting governments that are not trustworthy; and if this principle were to be established as a guide for the practice of British subjects, that the payment of such loans should be enforced by the arms of England, it

would place the British nation in the situation of being always liable to be involved in serious disputes with foreign governments, upon matters with regard to which the British government of the day might have had no opportunity of being consulted, or of giving an opinion one way or the other." Again the Noble Viscouut said—"Although I entreat the House, upon grounds of public policy, not to impose at present upon her Majesty's government the obligations which the proposed address would throw upon them, yet I would take this opportunity of warning foreign governments, who are the debtors to British subjects, that the time may come when this House will no longer sit patient under the wrongs and injustice inflicted upon the subjects of this country. I warn them that the time may come when the British nation will not see with tranquillity the sum of £150,000,000, due to British subjects and the interest not paid. And I must warn them, that if they do not make proper efforts, adequately to fulfil their engagements, the government of this country, whatever men may be in office, may be compelled, by the voice of public opinion, and by the votes of parliament, to depart from that which hitherto has been the established practice of England, and to insist upon the payment of debts due to British subjects. That we have the means of enforcing the rights of British subjects, I am not prepared to dispute. It is not because we are afraid of these states, or all of them put together, that we have refrained from taking the steps to which my noble friend would urge us. England, I trust, will always have the means of obtaining justice for its subjects from any country upon the face of the earth. But



this is a question of expediency, and not a question of power; therefore let no foreign country, which has done wrong to British subjects, deceive itself by a false impression, either that the British nation or the British parliament will ever remain patient under wrong; or that, if called upon to enforce the rights of the people of England, the government of England will not have ample power and means at its command to obtain justice for them."

The noble lord asserted generally the same course of policy in the discussions arising out of the refusal of the government of Greece to satisfy the claims of Don Pacifico, a British subject. (Speech of Lord Palmerston, June 26, H. of C., 1850.)

This principle is not only acknowledged, but has in several instances been acted upon by the Government of the United States. In 1834, it was proposed by President Jackson as a measure against France; and in 1847, a leading ground of the war between the United States and Mexico was the non-payment of debts due by Mexico to American citizens. These letters of reprisal, as being applicable to a state of peace, have been frequently reorganized and regulated by treaty, as by the treaty of Munster between Spain and Holland in 1648, by the treaties between England and Holland in 1654 and 1667, by the treaty between the United States and the Republic of Columbia in 1825, &c. The French ordinance of the Marine in 1681 (B. 3, tit. 10) regulates minutely this remedial process, and the judicial sanction requisite to the proceedings under letters of reprisal, and which Valin considers to be "sage precautions, proper to temper the rigour of this perilous mode of redress."

General reprisals upon the persons and properties of the subjects of another power are equivalent to open war. "I do not see any difference," said the Grand Pensionary De Witt, "between general reprisals and open war." Special letters of marque and reprisal, indeed, limited to a specific object, are spoken of generally, and even in the articles of confederation of the United States in 1781, article 9, expressly, as issuing 'in times of peace.' They are, however, regarded by Barbeyrac, Emerigon, and other publicists, as a species of hostility, an imperfect war, and usually a prelude to open hostilities; the favourable or adverse issue of the hazardous experiment will depend in some degree upon the matter in demand, and, in a much greater degree, upon the relative situation, character, strength and spirit of the nations concerned (Kent, i. 69—70).

The following is the Order in Council recently issued on the subject of general reprisals against Russia:—

"At the Court at Buckingham Palace, the 29th day of March, 1854,

"Present—The Queen's Most Excellent Majesty in Council.

"Her Majesty having determined to afford active assistance to her ally, his Highness the Sultan of the Ottoman empire, for the protection of his dominions against the encroachments and unprovoked aggression of his Imperial Majesty the Emperor of all the Russias, her Majesty, therefore, is pleased, by and with the advice of her Privy Council, to order, and it is hereby ordered, that general reprisals be granted against the ships, vessels and goods of the Emperor of all the Russias, and of his subjects or others inhabiting within

any of his countries, territories, or dominions, so that her Majesty's fleets and ships shall and may lawfully seize all ships, vessels and goods belonging to the Emperor of all the Russias or his subjects, or others inhabiting within any of his countries, territories, or dominions, and bring the same to judgment in such Courts of Admiralty within her Majesty's dominions, possessions, or colonies, as shall be duly commissionated to take cognizance thereof. And to that end her Majesty's Advocate-General, with the Advocate of her Majesty in her Office of Admiralty, are forthwith to prepare the draft of a commission, and present the same to her Majesty at this Board, authorizing the Commissioners for executing the office of Lord High Admiral to will and require the High Court of Admiralty of England, and the Lieutenant and Judge of the said Court, his Surrogate or Surrogates, as also the several Courts of Admiralty within her Majesty's dominions, which shall be duly commissionated to take cognizance of, and judicially proceed upon, all and all manner of captures, seizures, prizes and reprisals of all ships, vessels and goods, that are or shall be taken, and to hear and determine the same; and, according to the course of Admiralty, and the law of nations, to adjudge and condemn all such ships, vessels and goods as shall belong to the Emperor of all the Russias or his subjects, or to any others inhabiting within any of his countries, territories, or dominions; and they are likewise to prepare and lay before her Majesty, at this Board, a draft of such instructions as may be proper to be sent to the said several Courts of Admiralty in her Majesty's do-

minions, possessions, and colonies, for their guidance herein.

"From the Court at Buckingham Palace, this 29th day of March, 1854.

CRANWORTH, C.	DRUMLANRIG.
GRANVILLE, P.	MULGRAVE.
ARGYLL, C. P. S.	J. RUSSELL.
NEWCASTLE.	ERNEST BRUCE.
BREADALBANE.	SYDNEY HERBERT.
LANSDOWNE.	J. R. G. GRAHAM.
ABERCORN.	STEPH. LUSHINGTON.
ABERDEEN.	W. E. GLADSTONE.
CLARENDON.	WM. MOLESWORTH."

PRIVATEERS.

Martens calls privateering "the expeditions of private individuals during the war, who, being provided with a special permission from one of the belligerent powers, fit out at their own expense one or more vessels with the principal design of attacking the enemy, and preventing neutral subjects or friends from carrying on with the enemy a commerce regarded as illicit." A privateer differs from a pirate: first, the former is provided with a commission, or with letters of marque, from a sovereign, of which the pirate is destitute; secondly, the privateer supposes the case of a war (or at least that of reprisals), the pirate plunders in the midst of peace as in the midst of war; thirdly, the privateer is obliged to observe the rules

and instructions which are given him, and to attack by virtue of them only the enemy's ships, or those neutral vessels which carry on an illicit commerce; the pirate plunders indiscriminately the ships of all nations, without observing even the laws of war, but in the last point of view, privateers may become pirates when they transgress the limits prescribed to them." Those who, without public authority, plunder indiscriminately, are called pirates, *écumeurs de mer*, *forbans*, *zeeroovers*, &c.; while those who sail with letters of marque or with a commission are called *armateurs*, *privateers*, *freybuter*, *vreebuyter*, and *corsair*, which (from the Italian *Corso*) is the generic term of pirates and privateers.

The right of making war solely belongs to the sovereign power in the state, which not only decides whether it be proper to undertake the war and to declare it, but likewise directs all its operations. Subjects, therefore, cannot of themselves take any steps in this affair, nor are they allowed to commit any act of hostility without orders from their sovereign. Persons fitting out private ships to cruise against the enemy acquire the property of whatever captures they make, as a compensation for their disbursements, and for the risks they run; but they acquire it by grant from the sovereign, who issues out commissions to them. The sovereign allows them either the whole or a part of the capture. This entirely depends upon the nature of the contract made with them. As the subjects are not under an obligation of scrupulously weighing the justice of the war, which, indeed, they have not always an opportunity of being thoroughly acquainted with, and respecting which they are bound, in case of doubt,

to rely on the sovereign's judgment, they unquestionably may, with a safe conscience, serve their country, by fitting out privateers, unless the war be evidently unjust. But, on the other hand, it is an infamous proceeding on the part of foreigners to take out commissions from a prince, in order to commit piratical depredations on a nation innocent with respect to them. The thirst of gold is their only inducement, nor can the commission they have received efface the infamy of their conduct, though it screens them from punishment. (Vattel, B. iii. c. 15, ss. 223, 229.)

During the lawless confusion of the middle ages, the right of making reprisals was claimed and exercised without a public commission. It was not until the fifteenth century that commissions were held necessary, and began to be issued to private subjects in time of war; and that subjects were forbidden to fit out vessels to cruize against enemies without licence. There were ordinances in Germany, France, Spain, and England, to that effect. It is now the practice of maritime states to make use of the voluntary aid of individuals against their enemies, as auxiliary to the public force; and Bynkershoeck says, that the Dutch formerly employed no vessels of war but such as were owned by private persons, and to whom the government allowed a proportion of the captured property, as well as indemnity from the public treasury. Vessels are now fitted out and equipped by private adventurers, at their own expense, to cruize against the commerce of the enemy. They are duly commissionated, and it is said not to be a lawful cruize without a regular commission. Sir M. Hale held it to be depredation in a subject to attack the enemy's vessels, except in his own defence, without

a commission. The subject has been repeatedly discussed in the Supreme Court of the United States, and the doctrine of the law of nations is considered to be, that private citizens cannot acquire a title to hostile property, unless seized under commission; but they may still lawfully seize hostile property in their own defence. If they depredate upon the enemy without a commission, they act upon their peril, and are liable to be punished by their own sovereign; but the enemy are not warranted to consider them as criminals, and, as respects the enemy, they violate no rights by capture.

The practice of cruizing with private armed vessels, commissionated by the state, has been hitherto sanctioned by the laws of every maritime nation, as a legitimate means of destroying the commerce of an enemy. This practice has been justly arraigned as liable to gross abuses, as tending to encourage a spirit of lawless depredation, and as being in glaring contradiction to the more mitigated modes of warfare practised on land. Powerful efforts have been made by humane and enlightened individuals to suppress it, as inconsistent with the liberal spirit of the age. In the treaty between the United States and France in 1778, it was stipulated, that "No subject of the most Christian king shall apply for or take any commission or letters of marque for arming any ship or ships to act as privateers against the said United States, or any of them, or against the subjects, people, or inhabitants of the said United States, or any of them, or against the property of any of the inhabitants of any of them, from any prince or state with which the United States shall be at war; nor shall any citizen, subject, or inhabitant of the said United States, or any of them,

apply for or take any commission or letters of marque for arming any ship or ships to act as privateers against the subjects of the most Christian king, or any of them, or the property of any of the inhabitants of any of them, from any prince or state with which the United States shall be at war; nor shall any citizen, subject, or inhabitant of the said United States, or any of them, apply for or take any commission or letters of marque for arming any ship or ships to act as privateers against the subjects of the most Christian king, or any of them, or the property of any of them, from any prince or state with which the said king shall be at war; and if any person of either nation shall take such commission or letters of marque, he shall be punished as a pirate.

"It shall nor be lawful for any foreign privateers, not belonging to the subjects of the Most Christian King, nor citizens of the said United States, who have commission from any other prince or state at enmity with either nation, to fit their ships in the ports of either the one or the other of the aforesaid parties, to sell what they have taken, or in any other manner whatsoever to exchange their ships, merchandises, or any other lading; neither shall they be allowed even to purchase victuals except such as shall be necessary for their going to the next port of that prince or state from which they have commissions."

President Jefferson, in his message to Congress on the 3rd of December, 1805, in referring to the acts of privateers off the American coast, "some of them without commissions, some with illegal commissions, others with those of legal form, but committing piratical acts beyond the authority of their commissions,"

apprised Congress that he had equipped a force to capture all vessels of this description, and "to bring the offenders in for trial as pirates." In 1812, eight days after the declaration of war against England, Congress passed a law, limiting and defining the rights of privateers, and endeavoured, as far as practicable, to assimilate them to national vessels. The first section gives to the President the power to annul, at pleasure, all commissions which he might grant to privateers under the act of June 18, 1812. "Sec. 2. And be it further enacted, that all persons applying for letters of marque and reprisal, pursuant to the act aforesaid, shall state in writing the name, and a suitable description of the tonnage and force of the vessel, and the name and the place of residence of each owner concerned therein, and the intended number of the crew," &c. Sec. 3. "And be it further enacted, that, before any commission of letters of marque and reprisal shall be issued as aforesaid, the owner or owners of the ship or vessel for which the same shall be requested, and the commander thereof for the time being, shall give bond to the United States, with at least two responsible sureties, not interested in such vessel, in the penal sum of 5,000 dollars; or, if such vessel be provided with more than 150 men, then, in the penal sum of 10,000 dollars; with condition that the owners, officers, and crew who shall be employed on board such commissioned vessel, shall and will observe the treaties and laws of the United States, and the instructions which shall be given them according to law for the regulation of their conduct."

The subsequent sections of this Act compel the privateers to bring all captures into port for adjudica-

tion by the Court of Admiralty; prohibit their sailing without special instructions from the President; compel the captains to keep journals of everything that occurs from day to day, to be transmitted to the government; and make it the duty of the commanders of public armed vessels of the United States to examine such journals when meeting with privateers at sea, and to compel their commanders to obey their instructions.

This law was intended to restrain and modify the evils of privateering, and in 1846, when the American Government became involved in war with Mexico, President Polk, in his annual message to Congress on the 8th of December of that year, held the following language:—

"Information has recently been received at the Department of State that the Mexican Government has sent to Havana blank commissions to privateers and blank certificates of naturalization, signed by General Salas, the present head of the Mexican Government. There is also reason to apprehend that similar documents have been transmitted to other parts of the world. As the preliminaries required by the practice of civilized nations for commissioning privateers and regulating their conduct have not been observed, and as these commissions are in blank, to be filled up with the names of the citizens and subjects of all nations who may be willing to purchase them, the whole proceeding can only be construed as an invitation to all freebooters to cruise against American commerce. It will be for our courts of justice to decide whether, under such circumstances, these Mexican letters of marque and reprisal shall protect

those who accept them, and commit robberies upon the high seas under their authority, from the pains and penalties of piracy. If the certificates of naturalization thus granted be intended to shield Spanish subjects from the guilt and punishment of pirates, under our treaty with Spain they will certainly prove unavailing."

Although the Government of the United States has the merit of having been the first power in modern times which has endeavoured to put down this relic of the private wars, which disgraced the middle ages, it is curious to notice that during the short war between the United States and Great Britain, the legislature of the State of New York so far departed from these humane and enlightened views as to pass an act (Laws N. Y., 38th Session, c. 12, Oct. 21, 1814) "to encourage privateering associations, by authorizing any five or more persons, who should be desirous to form a company for the purpose of annoying the enemy in their commerce by means of private armed vessels, to sign and file a certificate, stating the name of the company and its stock, &c., and that they and their successors should thereupon be a body politic and corporate with the ordinary corporate powers."

Various attempts have been made by treaty to put an end to the system of privateering. In the treaty of amity and commerce between Prussia and the United States, in 1785, it was agreed that in case of war neither party should grant commissions to any private armed vessels to attack the commerce of the other—a stipulation which it seems difficult to consider binding or likely to be observed, and which in point of fact was not renewed with the renewal of the treaty. A similar

agreement was made between Sweden and Holland, in 1675, but in like manner was not practically carried into effect. The German jurist Büsch states that the French legislature, in 1792, passed a decree for the same purpose, but Martens declares that "he has never been able to discover any evidence of such decree."

The laws of the United States have made ample provisions with respect to the enlistment of American citizens in the service of foreign powers, which may be considered as an affirmance of the law of nations, and as prescribing specific punishments for acts which were before unlawful. (*Talbot* v. *Janson*, 3 Dallas, 133; *Brig Alerta* v. *Blas Moran*, 9 Cranch, 359.) "The Act of Congress of the 20th of April, 1818, c. 33, declares it to be a misdemeanor for any citizen of the United States, within the territory or jurisdiction thereof, to accept and exercise a commission to serve a foreign prince, state, colony, district, or people, with whom the United States are at peace; or for any person, except a subject or citizen of any foreign prince, state, colony, district, or people, transiently within the United State, or any foreign armed vessel within the jurisdiction of the United States, to enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or mariner, or seaman; or to fit out and arm, or to increase or augment the force of any armed vessel, with intent that such vessel be employed in the service of any foreign power at war with another power

with whom we are at peace; or to begin, or set on foot, or provide or prepare the means for any military expedition or enterprise, to be carried on thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people with whom we are at peace, or to hire or enlist troops or seamen for foreign military or naval service; or to be concerned in fitting out any vessel to cruise or commit hostilities against a nation at peace with us; and the vessel in this latter case is made subject of forfeiture."

In the case of *The Santissima Trinidad* it was decided "that captures made by vessels so illegally fitted out, whether a public or private armed ship, were tortious, and that the original owner was entitled to restitution if the property was brought within our jurisdiction." (7 Wheaton, 283.)

It may be well to add, that the laws of which Chancellor Kent gives the preceding synopsis expressly punish by fine and imprisonment any citizen of the United States found on board of letters of marque cruising against the commerce of a neutral power, or who shall leave the American jurisdiction with the intent of being so employed.

In 1819, at the time when a contest was carried on between Spain and her colonies in America, the British Government, on the requisition of Spain, followed the example which had been set by the United States; and by the 29 Geo. 3, c. 17 (the Foreign Enlistment Act), provided in a very comprehensive manner for the punishment of offences under this head. Similar prohibitions are contained in the laws of other countries. By the Austrian ordinance of neutrality of August 7th, 1803, and in the various

treaties between the powers of Europe during the course of the two last centuries, and in the several treaties between the United States and France, Holland, Sweden, Prussia, Great Britain, Spain, Columbia, Chili, &c., it is declared that no subject or citizen of either nation shall accept a commission or letter of marque, to assist an enemy in hostilities against the other, under pain of being treated as a pirate. The provisions of the Foreign Enlistment Act have recently been put in force in this country by a royal proclamation, dated Buckingham Palace, 9th March, 1854. Information having been received by the authorities that vessels constructed exclusively for warlike purposes had been built under contracts with the Russian Government, in different private yards in England and Scotland, the following proclamation was issued, to prevent these most powerful instruments of mischief, of contraband, ready made up, from being conveyed to the enemy, although at the time when the proclamation was issued, hostilities had not actually commenced.

BY THE QUEEN.—A PROCLAMATION.

Victoria, R.—Whereas, by an Act of Parliament, passed in the fifty-ninth year of the reign of his late Majesty King George the Third, entitled "An Act to prevent the enlisting or engagement of his Majesty's subjects to serve in foreign service, and the fitting out or equipping in his Majesty's dominions vessels for warlike purposes without his Majesty's licence;" it is amongst other things enacted, that if any person, within any part of the United Kingdom, or in any part of his Majesty's dominions beyond the seas, shall, without the leave or licence of his Majesty, his heirs,

or successors for that purpose first had and obtained, under the sign manual of his Majesty, his heirs, or successors, or signified by order in council, or by proclamation of his Majesty, his heirs or successors, equip, furnish, fit out or arm, or attempt or endeavour to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out, or armed, or shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel, with intent, or in order that such ship or vessel shall be employed in the service of any foreign prince, state or potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising, or assuming to exercise, any powers of government in or over any foreign state, colony, province, or part of any province or people, as a transport or store ship, or with intent to cruise or commit hostilities against any prince, state, or potentate, or against the subjects or citizens of any prince, state, or potentate, or against the persons exercising or assuming to exercise the powers of government in any colony, province, or part of any province or country, or against the inhabitants of any foreign colony, province, or part of any province or country with whom his Majesty shall not then be at war; or shall, within the United Kingdom, or any of his Majesty's dominions, or in any settlement, colony, territory, island, or place belonging or subject to his Majesty, issue or deliver any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid, every such person so offending shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, upon any information

or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the court in which such offender shall be convicted; and every such ship or vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores, which may belong to or be on board of any such ship or vessel, shall be forfeited. And whereas it has been represented to us that ships and vessels are being built in several places within the United Kingdom, and are being equipped, furnished, and fitted out, especially with steam machinery, with intent that they shall be employed as aforesaid, without our royal leave or licence for that purpose first had or obtained, or signified as aforesaid: We have, therefore, thought fit, by and with the advice of our Privy Council, to issue this our royal proclamation, warning all our subjects against taking part in such proceedings, which we are determined to prevent and repress, and which cannot fail to bring upon the parties engaged in them the punishments which attend the violation of the laws.

"Given at our Court at Buckingham Palace, this ninth day of March, in the year of our Lord one thousand eight hundred and fifty-four, and in the seventeenth year of our reign.

"GOD SAVE THE QUEEN."

The liberal and enlightened principles which have been enunciated and adopted by the United States, have been acted upon in a spirit of equal liberality and enlightenment by her majesty, who, in the declaration of war, dated Westminster, March 28th, 1854, announces to the world, that "her Majesty the Queen of the United Kingdom of Great Britain and Ireland, being

anxious to lessen as much as possible the evils of war and to restrict its operations to the regularly organized forces of the country, it is not her present intention to issue letters of marque for the commissioning of privateers." The French Minister of Marine, by a recent communication to the chamber of commerce, at Havre, has announced that it is not the intention of that government to issue letters of marque. The principle of the rule which has thus been laid down by her Majesty cannot be more emphatically stated than in the eloquent words of Franklin to Mr. Oswald, the British commissioner, in the negotiations for the peace of 1783. "It is for the interest of humanity in general, that the occasions of war and the inducements to it should be diminished. If rapine is abolished, one of the encouragements of war is taken away, and peace, therefore, more likely to continue and be lasting. The practice of robbing merchants on the high seas—a remnant of the ancient piracy—though it may be accidentally beneficial to particular persons, is far from being profitable to all engaged in it, or to the nation that authorizes it. In the beginning of a war some rich ships, not upon their guard, are surprised and taken. This encourages the first adventurers to fit out more armed vessels, and many others to do the same. But the enemy, at the same time, becomes more careful—arm their merchant ships better, and render them not so easy to be taken; they go also more under the protection of convoys. Thus, while the privateers to take them are multiplied, the vessels subject to be taken and the chances of profit are diminished, so that many cruizes are made, wherein the expenses overgo the gains, and, as is

the case in other lotteries, though some have good prizes, the mass of adventurers are losers; the whole expense of fitting out all privateers, during a war, being much greater than the whole amount of goods taken. Then there is the national loss of all the labour of so many men during the time they have been employed in robbing, who, besides spending what they get in riot, drunkenness, and debauchery, lose their habits of industry, are rarely fit for any sober business after peace, and serve only to increase the number of highwaymen and housebreakers. Even the undertakers, who have been fortunate, are, by sudden wealth, led into expensive living, the habit of which continues when the means of supporting it cease, and finally ruins them; a just punishment for their having wantonly and unfeelingly ruined many honest, innocent traders and families, whose subsistence was obtained in serving the common interests of mankind."

By the last Prize Act (55 Geo. 3, c. 160), which expired with the war, it was enacted—"That the lord high admiral of Great Britain, or the commissioners for executing the office of lord high admiral of Great Britain for the time being, or any three or more of them, or any person or persons by him or them empowered and appointed shall, at the request of any owner or owners, whom they shall deem fitly qualified, of any ship or vessel duly registered according to law (such owner or owners giving such bail or security as hereinafter is mentioned or expressed), cause to be issued in the usual manner one or more commission or commissions, or letter or letters of marque and reprisal, to any person or persons whom such owner shall nominate to be

commander, or, in case of death, successively commanders, of such ships or vessels, for the attacking, surprising, seizing, and taking by and with such ship or vessel, or with the crew thereof, any place or fortress upon the land, or any ship or vessel, arms, ammunition, stores of war, goods or merchandise, belonging to or possessed by any of his majesty's enemies in any sea, creek, haven or river; and that such ship or ships, vessel or vessels, arms, ammunition, stores of war, goods and merchandise whatsoever, with all their furniture, tackle and apparel, so to be taken by or with such private owner or owners' ship or vessel, according to such commission and commissions, or letter or letters of marque, after final adjudication as lawful prize in the high court of admiralty, or in any other court of admiralty in his majesty's dominions, which shall be duly authorized thereto, shall wholly and entirely belong to, and be divided between and among the owner or owners of such ship or vessel, and the several persons who shall be on board the same, and be aiding and assisting in the taking thereof, in such shares and proportions as shall be agreed on with the owner or owners of such ship or vessel, their agents or factors, as the proper goods and chattels of such owner or owners, and the persons who shall be entitled thereto by virtue of such agreements among themselves; and that neither his majesty, his heirs, or successors, nor any admiral, vice-admiral, governor, or other person commissioned by or claiming under his majesty, his heirs and successors, nor any other person or persons whosoever, other than the owner or owners of such ship or vessel being the captor of such prize ship or

vessel, arms, ammunition, stores of war, goods and merchandise, and the persons claiming under such agreements, shall be entitled to any part or share thereof, except as to the customs and duties hereafter mentioned, any law, usage, or custom to the contrary thereof in anywise notwithstanding: provided always, that nothing in this act contained shall extend, or be construed to extend, to entitle any person or persons to any interest in such ships or vessels, goods or merchandize, as may be captured by any private ships or vessels of war, belonging to or hired by, or in the service of his majesty's commissioners of customs or excise, but that the same ships or vessels, goods and merchandise so captured, shall belong to his majesty, and be applied and disposed of in such manner as his majesty, under his sign manual, shall order and direct, after legal adjudication thereof."

Commissions to privateers and letters of marque are also issued by the judges of the several vice-admiralty courts in the British colonies, by virtue of warrants from the governors, who are deputies of the lord high admiral within the limits of their respective provinces.

The commission of privateers in the United States is to be taken in its general terms, with reference to the laws under which it emanates, and as containing within itself all the qualifications and restrictions which the act giving it existence has prescribed. In this view, the commission is qualified and restrained by the power of the President to issue instructions. The privateer takes it subject to such power, and contracts to act in obedience to all the instructions which the President may lawfully promulgate. (*The Thomas Gib-*

bons, 8 Cranch, 421.) The American Courts also hold that it is of no consequence as respects the validity of a capture made by a privateer, that the commander is an alien enemy. The utmost that could result from this circumstance would be, the condemnation of his interest in the prize to the government as a droit of admiralty. The owners and crew are as much parties in the prize court as the commander, and his national character can in no wise affect their rights. (*The Mary and Susan*, 1 Wheaton, 46.)

Privateers, properly so called, are equipped for the sole purpose of war; but merchantmen carrying cargoes are frequently furnished by the Admiralty with what is called a letter of marque, enabling them to make reprisals against the enemy. But this object is collateral and secondary; and in this respect, letters of marque differ from privateers, though in many books, and also in popular language, all private ships commissioned for war are termed letters of marque. Sometimes the Lords of the Admiralty have this authority by a proclamation from the sovereign in council, as was the case in December, 1780, when they were thus empowered to issue letters of marque against the Dutch. Such commissions, however, are only available against countries at war with England; for if a letter of marque wilfully and knowingly take a ship belonging to a nation at amity with England, this amounts to downright piracy. (Molloy, c. 2, s. 23.) But in the case of *The Sacra Familia* (5 Rob. 360), where the prize was a Spanish vessel of considerable value, taken by a Liverpool privateer, not having on board a letter of marque against Spain, the master having made

the capture expressly on the ground of Spanish hostilities, and having in his possession the gazette containing intelligence of that occurrence, which he showed to the master of the Spanish vessel, though a king's ship came up after the capture and dispossessed the privateer, the claim of the latter to share as joint captor was established.

With regard to revenue cutters, it was decided in the case of *The Helen* (3 Rob. 224), that a revenue cutter, a custom-house vessel, with a letter of marque, was entitled to salvage, on recapture, as a private vessel of war. These vessels used occasionally in former wars to provide themselves with letters of marque at their own expense. This was found in some degree inconvenient to the proper service in which they were employed by the government; instead of looking after petty smugglers under their public commission, they were looking after rich vessels of the enemy, under their letters of marque, which entitled them to the whole benefit of such prizes, though they had been fitted out, manned and armed, not at the expense of the owners, but at the expense of that government, which was thus, to a certain degree, defrauded of their proper service. On the breaking out of the late war, it was deemed advisable to annoy the enemy's commerce upon their own coasts, and to intercept the return of their vessels into their own ports; and it was thought that these vessels were eminently qualified for this service, from their intimate acquaintance with the coasts of France, and their experience in that navigation. The government, therefore, directed them to be provided with letters of marque, for the purpose of

enabling them to act hostilely in the service required, but at the same time to prevent their acting without control and with injury to their other public duty, reserved the distribution of all prizes taken by these vessels to its own discretion. Besides these purposes of public policy which this arrangement answered, it had the additional advantage of providing a sort of general fund out of which the government might reward at its discretion such of them as had cruized with merit but without success; but Lord Stowell held that the Prize Act of 1801 did not extend to recaptures made by these vessels, and decreed salvage of one-sixth.

Ships furnished with letters of marque are to be deemed ships of war. "A ship furnished with a letter of marque is manifestly a ship of war, and is not otherwise to be considered, because she acted also in a commercial capacity. The mercantile character being superadded, does not predominate over or take away the other. (Lord Stowell, in *The Fanny*, 1 Dodson, 448.)

Upon granting letters of marque, the captain and two sureties must appear and give security; but upon consideration of convenience, where the captain is absent, the practice of the court permits some other person to appear for him, the person so appearing rendering himself by the act personally responsible. (*Rex* v. *Fergusson*, Edwards, 84.)

The owner of a privateer is the person whose name appears on the ship's register, and such person is alone responsible, by himself or his representative, for the claims of British subjects. Foreigners, however, are

not debarred, by this limitation, from maintaining a claim against bonâ fide owners not inserted in the ship's register. In *The Nuestra Senora de los Dolores* (1 Dodson, 290), where the part-owner of a privateer sought to evade a claim against him preferred by a foreigner, on the ground that his name was not on the ship's register, Lord Stowell said: "It appears that Mr. Parry was actively and directly concerned in the purchase and outfit of this vessel, and that the appointment of the master took place under his own directions. There is a series of letters, too, which show that he continued afterwards to bestow his time and attention in the management of this property, as property in which he was interested. Nothing, therefore, can be more clear, than that he is to be considered as a proprietor, and that he would in all justice be entitled to the benefit which might be acquired in that character, and consequently that he must be responsible for all the loss that may be sustained. Mr. Parry, having contributed his money in the purchase and outfit of this vessel, had a legal right to have his name inserted in the register, and he can have no right to plead his own *laches* in order to relieve himself from a claim.

The owners of a privateer are liable for any injury which, through ignorance or illegality, the officers and crew may inflict upon others in the execution of the business in which they may be employed; but where the master exceeds his orders, and is guilty of faults or crimes to the injury of others acting in some business different from that in which he was employed, the owner is not liable. To make the owners liable

for an injury done by the master and crew of a privateer, there must be a capture as prize of war; but in a piratical seizure and spoliation, the owners are not liable beyond the penalty of the bond given according to law and the loss of their vessel. (*Dias* v. *The Revenge*, 3 Washington, 262.) Where, however, the master or crew commit acts of outrage exceeding their authority in the performance of legitimate acts, the owners are liable to the full value of the property injured or destroyed, though a claim for loss of voyage will not be admitted, the principle of the court being against vindictive damages for trespasses committed by a crew. (*The Amiable Nancy*, 1 Paine, 111.) In the same case, where a neutral vessel was plundered of her papers by a privateer, in consequence of which she was seized by another belligerent, and proceeded against as prize, but made a compromise with her captors, and paid a ransom and costs, it was held that the owners of the privateer were not liable for those items (there being no privity to the compromise), nor for any other injurious consequences flowing from the compromise. A captor, though actuated by a sense of duty to his government in destroying the property he has taken, is still responsible to the fullest extent to the claimant, and must look to his own government for indemnification. (*The Actæon*, 2 Dod. 48.)

All the owners of a privateer are responsible conjointly and severally *in solidum*, and it will not avail a part owner to plead compensation *pro tanto*, or a release of the claimant as to him individually. (5 Rob. 291.) With reference to foreign claimants, however, Lord Stowell said (in the *Neustra Senora*

de los Dolores, ubi sup.): "The Act of Parliament, commonly called Lord Liverpool's Act (26 Geo. 3, c. 60), makes it necessary that the name of the owner should appear in the register; and it has been decided in a variety of cases, and is to be taken as clear and established law, that third parties, if British subjects, have no claim on any but the person registered as owner. But I am yet to learn that this rule is applicable to foreigners, who are not bound by the municipal institutions of this country. This is a question of the law of nations, and the party complainant being a foreigner, comes to a court which has to administer that law. Being a British statute, it may well bind all the subjects of this country, but against the subjects of other countries it has no such force."

Sentence of condemnation by a prize court is absolutely necessary in the case of a privateer to complete the transfer of maritime prizes from the original owners to the captors; so that if a ship taken by a privateer be not brought into a British port and condemned, the captors acquire no legal property in the prize, and the sale of the prize, under such circumstances, conveys no property in it to the purchaser. (15 Viner's Ab. 57.)

A subject of the British crown cannot take goods belonging to the subjects of a prince in amity with the sovereign by virtue of letters of marque granted by any other sovereign or state. (2 Vern. 592.)

Privateers are not within the terms of a capitulation protecting private property generally. The *Dash*, pierced for sixteen guns, with gun tackles, bolts, &c., was taken possession of, with two others, in the har-

bour of Browers-haven, after the surrender of Walcheren, in virtue of orders from Commodore Owen, commanding a division of his Majesty's ships engaged in the expedition. A claim was made on behalf of Minter and Co., of Browers-haven, for this vessel, under the second article of the capitulation, by which it was stipulated that *all private property should be respected.* Lord Stowell said: "Privateers are private property in one sense, but they have at the same time a public character impressed upon them by their employment; though they are private property, they are still private property employed in the public service." (1 Edwards, 271.)

"By the law of nations," says Molloy (b. 1, c. 2, s. 18), "letters of marque or reprisal will not authorize the molestation of ambassadors, nor of those who travel for religion; nor of students, scholars, or their books; nor (by the civil law) of women or children; nor those that travel through a country, staying but a little while there, for they are only subject to the law of that place." By the canon law, ecclesiastical persons are expressly exempt from reprisals: "nor is a merchant of another place than that against which reprisals are granted, though the factor of the goods were of that place, subject to reprisals."

Letters of marque may be vacated in three ways; by express revocation, or by a cessation of hostilities between the nations which they affect, or by the misconduct of the grantees. Letters granted during war, having usually been designed only for the general annoyance of the enemy, may be vacated by the mere express revocation of the sovereign. But with regard

to letters granted during peace, by way of reparation to subjects for losses actually sustained by them from foreigners, these, says Molloy (lib. i. c. 2, s. 8), can be revoked by no domestic act of the government, because, after the person injured has petitioned, and made legal proof of his loss, and letters of request have gone, and no reparation been made, then the letters of reprisal being sealed, create and vest a national debt in the grantee. Even this claim, however, is defeated by the cessation of hostilities, as appears from a case decided on by the Lord Chancellor Nottingham. (*Rex* v. *Carew*, 3 Swanston, 669.) The defendant, as executor, was entitled to letters of reprisal, granted by the king, for a great sum of money, and containing a clause, that no treaty of peace should prejudice them. But his majesty afterwards, by several treaties of peace with the Dutch, expressly articled that they should not be damnified by these letters patent. The question was, whether the king could, by any treaty of peace, annul, or, in the technical phrase, amortise this instrument. Lord Nottingham was of opinion, that letters of marque might be revoked and amortised by a truce, and by letters of safe-conduct, and, *à fortiori*, by a treaty of peace. It seems reasonable that, after a solemn ratification of amity between nations, no retrospect of private grievances, unprovided for by the convention, should be allowed. Letters of marque may also be vacated by the misconduct of the parties.

In the case of *The Mariamne* (5 Rob. 9), the master of the captured vessel represented to the captain of a king's ship, that one of two privateers that were the actual captors had fired into the ship after the surren-

der, and by that act had killed one of the men. In this representation a proceeding was instituted by the Admiralty against the privateer, to deprive her of her letter of marque. Lord Stowell, in giving judgment, said, that "the fact alleged is of a very atrocious kind, and would certainly, if proved, draw with it all the consequences that have been pressed against the parties. During the contest destruction is necessary and lawful, but it is contrary to every principle of the law of nations, that, after the contest has ceased, hostile and destructive force should still be continued. The only thing that I have to consider is the proof of the fact; because the law is laid down by the Prize Act, which expressly inflicts upon all acts of cruelty the forfeiture of the letter of marque, and this I consider to be no more than a formal declaration of what was the ancient law of the Admiralty." The act of cruelty not having been satisfactorily proved, the proceedings by the Admiralty were not held to have been substantiated. Lord Stowell added that, "the officers of king's ships must understand, that they have no authority to dispossess privateers. Such vessels are duly commissioned and represent the public authority. The king has been pleased to communicate his bounty to them, and they stand generally, with respect to an interest in prize, on the same footing as other parts of the public force of the country."

A privateer's commission must be actually sealed and issued before she can take a prize for her own benefit. A mere application for a letter of marque will not be sufficient. (*The Spitfire*, 2 Rob. 285, note.)

NEUTRALS.

"NEUTRAL nations (says Vattel, B. iii. c. 7) are those which, in time of war, do not take any part in the contest, but remain common friends to both parties, without favouring the arms of the one to the prejudice of the other. As long as a neutral nation wishes securely to enjoy the advantages of a neutrality, she must in all things show a strict impartiality towards the belligerent powers. Should she favour one of the parties to the prejudice of the other, she cannot complain of being treated by him as an adherent and confederate of his enemy. Her neutrality would be a fraudulent neutrality, of which no nation will consent to be the dupe. The impartiality which a neutral nation ought to observe relates solely to war, and includes two articles, first, to give no assistance when there is no obligation to give it, nor voluntarily to furnish troops, arms, ammunition, or anything of direct use in war—I do not say 'to give assistance equally,' but 'to give no assistance;' for it would be absurd that a state should at one and the same time assist two nations at war with each other; and besides it would be impossible to do it with equality. The same things, the like number of troops, the like quantity of arms, of stores, &c., furnished in different circumstances, are no longer equivalent succours. In whatever does not relate to war, a neutral and impartial nation must not refuse to one of the parties, on account of his present quarrel, what she grants to the other."

There may, indeed, be exceptions to this rule, arising out of previous treaties, as where Denmark, under a

previous treaty of defensive alliance, furnished limited succours in ships and troops to the Empress Catharine of Russia, in the war of 1788, against Sweden; or where, under the treaty of amity and commerce of 1778, between the United States and France, the latter reserved to herself special privileges in the American ports; admission for her privateers with their prizes to the exclusion of her enemies, and the admission for her public ships of war, in case of urgent necessity, to refresh, victual, repair, &c., but not exclusively with other nations at war with her. The fulfilment of such an obligation does not necessarily forfeit for the neutral power his neutral character, nor render him the enemy of the other belligerent nation, because it does not render him the general associate of his enemy. This kind of neutrality is described by Martens on Captures, &c., p. 217, as a species of *conventional neutrality*. "Consequently," continues Martens, "a power which sends assistance in troops or money to one of the belligerent powers, or even in strictness which permits its subjects to take out letters of marque from the enemy, in order to fit out a privateer, can no longer demand to be treated as a neutral power, although, in certain cases, as when sovereigns let out their troops to the enemy by virtue of treaties of subsidy, it has become customary to treat it as such, and to attribute to it an imperfect or limited neutrality.

"As every state, then, has a right, in time of peace, to grant or refuse permission to any power to raise troops in its dominions, or to cause a detachment of troops to enter or pass through them, and even to grant one power what it refuses another, it may in like manner grant or refuse these privileges to belligerent

powers, and even continue in time of war to observe the same inequality as it observed in time of peace, without deviating by that act from the sentiments of impartiality, of which a neutral power ought to make a law.

"In practice it is generally acknowledged, that it is as little allowable in time of war as in time of peace to enter with an armed force into a neutral territory, without having asked and obtained permission so to do; but it is allowed that an entry, made against the will of such a power, may be justified by necessity. Every inequality, which a power observes in this respect during the war, is considered as being in fact contrary to neutrality, so that we think ourselves in the right to take by force what, by refusing to us, it grants the enemy; and even, when displeased with the real or apparent equality which a neutral power offers to establish, we are permitted sometimes to prevent, indeed, what it is of more importance to the enemy than to us to obtain, or to appropriate to ourselves that of which the refusal is more disadvantageous to us than to the enemy, under the pretext of either the want of real impartiality or of the law of necessity.

"In like manner, the law of nature prohibits the commencing or prosecuting of hostilities on the territories, or on parts of the sea, subject to a neutral power, which could not be done without violating the privilege of life and death of the sovereign ruling there. Thus this point is acknowledged by custom, and powers have often even engaged by treaty, not to commit and not to suffer hostilities on neutral territory; and although there are only a few instances of this kind of violations, no custom can originate from them,

inasmuch as complaints have not ceased to be made, and necessity alone can serve as a pretext to justify them. It is not, therefore, allowable to take away from a friendly territory the hostile property found there; and, by a consequence of the same principle, the booty which the enemy introduces there does not cease to belong to him, and does not fall again into the hands of the ancient proprietor. He may even sell it, unless this last point has been settled otherwise by treaties."

In like manner the property of a neutral power which we find in the enemy's hands, whether movable or immovable, ought to be exempted from hostilities, the belligerent power having no claim on them. This point, therefore, is observed with as much strictness as the confusions of war will permit. It is uncertain whether the universal law of nations allows, the case of extreme necessity excepted, of the seizure (embargo) of neutral ships, which are found in our ports at the time when the war first breaks out, with the intention of making use of them for the wants of the fleet, if we pay them for their services. Custom has introduced the exercise of this privilege, but several treaties have abolished it. The leading principles of the law of nations, as affecting the goods of a neutral, are thus succinctly laid down in the report made to the king, in 1753, by Sir George Lee, Judge of the Prerogative Court, Dr. Paul, Advocate General, Sir Dudley Ryder, Attorney General, and Mr. Murray (afterwards Lord Mansfield), Solicitor General:—

1. The goods of an enemy on board the ship of a friend may be taken.
2. The lawful goods of a friend on board the ship of an enemy ought to be restored.

3. Contraband goods going to the enemy, though the property of a friend, may be taken as prize, because the supplying the enemy with means which enable him better to carry on the war, is a departure from neutrality.

"One of the most important points," writes Martens (*ubi sup.*), "with respect to the conduct which neutral powers have to observe, is, the commerce to be carried on with the enemy. But if we consider the affair on the part of the neutral power, the right which it had in time of peace of selling and conveying every species of merchandize to every nation that would trade with it, remains also to it at the time war arises between two powers, so that it may permit its own subjects to convey every species of merchandize, and even arms and ammunition, to both the belligerent powers, or to either of them, with which such commerce can be still carried on or be established most advantageously: so long as the state does not embroil itself, either by prohibiting commerce to be carried on with one or with both the belligerent parties, it seems that it does not transgress by such conduct the duties of neutrality. Nevertheless, as the belligerent power has a right to prevent its enemy from being reinforced by what is of use in war, the case of necessity in which it finds itself may justify it in preventing the enemy from receiving these commodities; it ought at all times to confine itself to the detention of them during the continuance of the war, or to appropriate them to its own use on paying the value of them to the neutral proprietor. But the right of confiscating these commodities, or even the ships which are carrying them, cannot it seems belong to an enemy till a

neutral power has violated the laws of neutrality, and confiscation is made at a place subject to the laws of the sovereign who exercises it. In pursuance of this last principle, and of the rights which every sovereign in general has, a belligerent power may even prohibit all commerce with the enemy, first, throughout the whole extent of his territories and maritime dominion; secondly, in the places and provinces of the enemy of which he has got possession; and thirdly, even with the places which it keeps blocked up in such a manner that it finds itself able to prohibit entrance to it to every foreigner. In all these cases, it may add to its prohibitions penalties, whether they be confiscation of merchandize or ships, or corporal punishments of those who are instrumental in carrying on such commerce. A belligerent power is, without doubt, permitted to confiscate hostile merchandize and ships. But since it can neither exercise hostilities against a neutral place, nor confiscate property belonging to neutral subjects, it ought to refrain from the confiscation of hostile property which it finds on board a neutral ship sailing on a free or neutral sea, and from that of neutral property, although it be found on board an hostile ship, supposing such property is not made use of for war; still less can such power in the first case confiscate the ship; it has, nevertheless, a right to require a ship which it meets, even on a free sea, to prove its neutrality, and an hostile ship to prove the neutral property of the commodities; this proof being given, the vessel, together with its cargo, ought to be released, or in the latter case, the cargo only."

If a belligerent adopts a mode of conduct towards

a neutral, which amounts to an act of hostility, and in which that neutral acquiesces, the other belligerent has a right to retaliate; and if a decree interdicting a neutral from trading with us, or visiting our ports, is executed upon him, it is an interdiction he has no right to submit to, because the moment it is executed, we are injured by the interruption of his commerce with us. (Lord Holland's Speech on the Orders in Council, Feb. 1808; Baring, on Orders in Council, p. 110.) If he submits, from favour, to the unjust belligerent, he directly interposes in the war, and the neutral character is at an end; retaliation then would not only be strictly applicable, but just and legal; and if he submits from weakness or from any other cause not hostile or fraudulent, we have an unquestionable right, without any invasion of neutrality, to insist, that what he suffers from the enemy he shall consent to suffer from us, otherwise he would keep an open trade with the enemy at our expense, relieving him from the pressure of the war, and becoming an instrument of its illegal pressure upon us. In that case also, the term retaliation, though not applicable perhaps in literal strictness, as it applies to the neutral, is substantially and justly applicable to him; because it is, in fact, retaliation upon the enemy through the sides of the neutral, in a case where the injury to us cannot exist without the participation of the neutral, in doing or suffering, by either of which our commerce is interrupted. (Lord Erskine's Speech on Orders in Council.) In *The Nayade* (4 Rob. 251), Lord Stowell decided that goods the property of a merchant resident in Portugal, and assigned from thence to Bordeaux, were liable to capture by a British vessel, the

Portuguese having submitted to repeated insults from France, though she had not declared war. "Upon the breaking out of war," said Lord Stowell, "it is the right of neutrals to carry on their accustomed trade, with an exception of the particular cases of a trade to blockaded places, or in contraband articles, and of their ships being liable to visitation and search."

In the case of *Barker* v. *Blakes* (9 East, 283), where a neutral ship, trading to a hostile port, had been detained for the purpose of search, and thereby lost her voyage, the underwriters being called upon to indemnify the neutral owner, attempted to set aside his claim, on the ground that a neutral could not, in a British court, recover an indemnity for losses incurred in a trade which he had carried on with the enemies of Britain, in contravention of her interests and policy. But the right of the neutral to carry on such a trade was vindicated and clearly established by Lord Ellenborough, who decided, not only that a neutral had a right to pursue his general commerce with the enemy, but that he had a right even to act as the carrier of the enemy's goods from his own to the enemy's country, without being subject to any confiscation of the ship, or of the neutral articles which might be on board, though certainly not without the risk of having his voyage interrupted by the seizure of hostile property.

As, on the one hand, a neutral has a free and just right to carry the property of enemies in his own vessels; so, on the other, his own property is inviolable, though it be found in the vessels of enemies. (Marshall, b. 1, c. 8, s. 5, quoting the "Consolato del

Mare," and Bynkershoeck.) "It is to be restored to the owners," says Vattel (b. 1, c. 7, s. 116), "though without any allowance for detention, decay, &c. The loss sustained by the neutrals, on this occasion, is an accident to which they expose themselves by embarking their property in an enemy's ship; and the captor, in exercising the rights of war, is not responsible for the accidents which may thence result, any more than if his cannon kills a neutral passenger who happens unfortunately to be on board an enemy's vessel."

The law on this subject does not appear to have been always so distinctly understood; and it was an old saying, mentioned by Grotius, "That goods found in our enemies' ships are reputed theirs." But the sense of the maxim amounts only to this, that it is commonly presumed in such case, that the whole belongs to one and the same master; a presumption, however, which, by evident proofs to the contrary, may be rebutted, and so it was formerly adjudged in Holland, in a full assembly of the sovereign court, during the war with the Hanse Towns, in the year 1338, and from thence has passed into a law. At present the law is so completely settled that if a neutral, in partnership with any other trader, engage in a trade, which to that partner is illegal, yet the share of the neutral is not affected by the illegality of such partner's trade. In *The Franklin* (6 Rob. 120; *The Zulema*, 1 Acton, 14), which was a case of partnership between Mr. John Bell, residing in America, a neutral country, and Mr. William Bell, residing in England, a belligerent country, the partnership appeared to have carried on a trade in tobacco with the enemy; a trade which, as to Mr. J. Bell, a

merchant residing in a neutral country, was perfectly lawful, but which to Mr. William Bell, residing in a belligerent country, and therefore invested with the national character of a belligerent, was of course illegal, as all trade with the enemy is according to the laws of all nations. The tobacco was seized; the share of Mr. William Bell was condemned, but that of Mr. J. Bell, who retained his neutral character, was saved harmless. If, however, the neutral voluntarily constitute himself agent of the belligerent, and make use of false papers, his share in the cargo will also become liable to condemnation. (*The Zulema*, 1 Acton, 14.)

A capture made by citizens of the United States of property belonging to subjects of a country in amity with the United States, is unlawful wheresoever the capturing vessel may have been equipped or by whomsoever commissionated; and the property thus captured, if brought within the neutral limits of the United States, will be restored to the original owners. (*The Bello Corrunes*, 6 Wheaton, 152.) In the case of an illegal augmentation of the force of a belligerent cruizer, in the ports of the United States, the *onus probandi* is thrown on the cruizer to show, that the persons enlisted were subjects of the belligerent state, or belonging to its service, and then transiently within the United States. The exemption of foreign public ships coming into the waters of the United States, under an express or implied licence from the local jurisdiction, does not extend to their prize ships or goods captured in violation of the neutrality of the United States. (*La Santissima Trinidad*, 7 Wheaton, 283.)

Where a capture is made of the property of the subjects of a nation in amity with the United States, by a

vessel built, armed, equipped, and owned in the United States, such capture is illegal, and the property, if brought within the territorial jurisdiction of the United States, will be restored to the original owners. (*La Concepçion*, 6 Wheaton, 235.) Where a transfer of the capturing vessel in the ports of the belligerent state, under whose flag and commission she sails, is set up, in order to legalize the capture, the *bona fides* of the sale must be proved by the usual documentary evidence in a satisfactory manner. (*Ib.*) In *The Fanny*, however (10 Wheaton, 658), a case of capture by an armed vessel, fitted out in the ports of the United States in breach of neutrality, and where the claim of an alleged *bonâ fide* purchaser in a foreign port was rejected and restitution decreed to the original owner, it was held that the *bonâ fide* purchaser without notice is in such case entitled to be reimbursed the freight which he may have paid on the captured goods; and that the innocent neutral carrier of such goods, the same having been transhipped in a foreign port, is entitled to freight out of the goods. So also in *The Commercen* (2 Gallison, 264), it was decided as a general rule that the neutral carrier of enemies' property is entitled to his freight, though there are many exceptions to the rule, as where the property consists of contraband articles carried to the enemy. A neutral cargo on board an armed vessel of the enemy is not liable to condemnation as a prize of war. (*The Atalanta*, 3 Wheaton, 409.) Mr. Justice Story dissented from this principle in the case of *The Nereide* (9 Cranch, 388), where the majority of the court decided that the neutral came within this exemption, provided he had not armed the vessel, or aided in the resistance, although he had

chartered the vessel, and was on board at the time of the resistance.

The general inviolability of the neutral character extends, in some instances, to protect the property of belligerents, as well as of neutrals. "It is unlawful," says Vattel, Book 3, c. 7, s. 132), "to attack an enemy in a neutral country, or to commit in it any other act of hostility. The Dutch East India fleet having put into Bergen, in Norway, in 1666, to avoid the English, the English admiral had the temerity to attack them there, but the governor of Bergen fired on the assailants, and the court of Denmark complained, though perhaps too faintly, of an attempt so injurious to its rights and dignity. At present, the whole space of the sea, within cannon shot of the coast, is considered as making a part of the territory; and, for that reason, a vessel taken under the cannon of the neutral fortress, is not lawful prize.

Martens, in his Summary of the Law of Nations (Book 8, c. 6, s. 6; and see Molloy, Book 1, c. 3, s. 7, & c. 4, s. 16), enforces the same doctrine, and adds, in a note, that "when two vessels, the enemies of each other, meet in a neutral port, or when one pursues the other into such port, not only must they refrain from all hostilities while they remain there, but, should one set sail, the other must not set sail in less than twenty-four hours afterwards."

In *The Anna* (5 Rob. 373), Lord Stowell said: "Captors must understand, that they are not to station themselves in the mouth of a neutral river, for the purpose of exercising the rights of war from that river; much less in the very river itself. They are not to be standing on and off, overhauling vessels in

their course down the river, and making the river as much subservient to the purposes of war, as if it had been a river of their own country." But the principal decision is *The Twee Gebroeders* (3 Rob. 162). In that case, boats had been sent out from *L'Espiegle*, a British ship, which was itself lying in the Eastern Eems, within the protection of the neutral territory of Prussia, to capture the vessel called *The Twee Gebroeders*, with three others, which were all lying a little way out at sea. A claim was given in against the captors by the Prussian consul, in consequence of the violation of his country's neutrality. In that case Lord Stowell observed, "It is said, that the ship was, in all respects, observant of the peace of the neutral territory; that nothing was done by her, which could affect the right of territory, or from which any inconvenience could arise to the country, within whose limits she was lying: inasmuch as the hostile force which she employed, was applied to the captured vessel lying out of the territory. But that is a doctrine that goes a great deal too far; I am of opinion, that no use of a neutral territory for the purposes of war is to be permitted. I do not say remote uses, such as procuring provisions and refreshments, and acts of that nature, which the law of nations universally tolerates; but, that no proximate acts of war are, in any manner, to be allowed to originate on neutral ground: and I cannot but think, that such an act as this, that a ship should station herself on neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted. For supposing, that even a direct hostile use should be required to bring it within the prohibition of the law of

nations, nobody will say, that the very act of sending out boats to effect a capture, is not itself an act directly hostile, not complete, indeed, but inchoate and clothed with all the characters of hostility. If this could be defended, it might as well be said, that a ship, lying in a neutral station, might fire shot on a vessel lying out of the neutral territory; the injury, in that case, would not be consummated, nor received on neutral ground, but no one would say, that such an act would not be an hostile act immediately commenced within the neutral territory. And what does it signify to the nature of the act, considered for the present purpose, whether I send out a cannon shot, which shall compel the submission of a vessel lying at two miles distance, or whether I send out a boat, armed and manned, to effect the very same thing at the same distance? It is, in both cases, the direct act of the vessel lying in neutral ground. The act of hostility actually begins, in the latter case, with the launching, and manning, and arming the boat, that is sent out on such an errand of force.

"If it were necessary, therefore, to prove, that a direct and immediate act of hostility had been committed, I should be disposed to hold, that it was sufficiently made out by the facts of this case. But direct hostility appears not to be necessary; for whatever has an immediate connection with it is forbidden. You cannot, without leave, carry prisoners or booty into a neutral territory, there to be detained: because such an act is an immediate continuation of hostility. In the same manner an act of hostility is not to take its commencement on neutral ground. It is not sufficient to say, It is not completed there; you are not to

take any measure there, that shall lead to immediate violence; you are not to avail yourself of a station in neutral territory, making, as it were, a vantage ground of the neutral country, a country which is to carry itself with perfect equality between both belligerents, giving neither the one nor the other any advantage. Many instances have occurred, in which such an irregular use of a neutral country has been warmly resented: and some, during the present war. The practice which has been tolerated in the northern states of Europe, of permitting French privateers to make stations of their ports, and to sally out to capture British vessels in that neighbourhood, is of that number; and yet, even that practice, unfriendly and noxious as it is, is less than that complained of in the present instance: for here, the ship, without sallying out at all, is to commit the hostile act. Every government is perfectly justified in interposing to discourage the commencement of such a practice; for the inconvenience, to which the neutral territory will be exposed, is obvious. If the respect due to it is violated by one party, it will soon provoke a similar treatment from the other also, till, instead of neutral ground, it will become the theatre of war."

The immunity which neutral territory imparts, is not imparted by neutral ships; for an enemy's goods may be regularly captured on board a neutral ship, as in any other situation. "If we find an enemy's effects on board a neutral ship," says Vattel (Book 3, c. 7, s. 115), "we seize them by the right of war; but we are naturally bound to pay the freight to the master of the vessel, who is not to suffer by such seizure." But this freight is not, in all cases, to be measured by the charter party (1 Molloy, 18; *The Twilling Riget*, 5

Rob. 82), but particular states have sometimes relaxed the rigour of the rule, and granted, by treaty, a privilege of immunity to all goods found sailing in each other's ships, to whomsoever such goods may belong; the maxim, in such cases, being "free ships, free goods." Such a privilege was granted by this country to Portugal in the treaty of 1654. (5 Rob. 52; 6 Rob. 24, 41, 358.)

With regard to the present war, her Majesty has declared, "that in order to preserve the commerce of neutrals from all unnecessary obstruction, her Majesty is willing for the present to waive a part of the belligerent rights appertaining to her by the law of nations;" and that, although it is impossible "for her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches; and although she must maintain the right of a belligerent to prevent neutrals from breaking any effectual blockade, which may be established with an adequate force against the enemy's forts, harbours, or coasts, her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war; nor is it her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships."

BLOCKADE.

It has been shown that while neutral powers are permitted to trade in innocent merchandise with the enemy, and to convey it to him, they may not convey it to him into places that are blockaded, with which

all commerce is forbidden. It is expedient, therefore, next to explain what blockade is, and the manner in which it is considered by the law of nations.

Blockade is the carrying into effect, by an armed force, of that rule of war which renders commercial intercourse, with the port or place blockaded, unlawful on the part of neutrals.

"Amongst the rights of belligerents," (says Dr. Phillimore, in his able work on Licences, p. 49,) "there is none more clear and incontrovertible, or more just and necessary as to its application, than that which gives rise to the law of blockade, as it has been ascertained, defined, and administered by the maritime tribunals of this country. The greater the research that shall be made into the principles of natural law, the more the details of the diplomatic and conventional history of Europe shall be studied, the more will it appear that this right has its origin in the purest sources of maritime jurisprudence, that it is sanctioned by the practice of the best times, and above all, that it is so essentially connected with the vital interests of Great Britain, that the renunciation of it, under any circumstances, must be regarded as the renunciation of one of the firmest charters of our naval pre-eminence, and as the surrender of one of the surest bulwarks of our national independence."

"If," says Vattel (B. 3, ch. 7, sect. 117), "I lay siege to a place, or simply blockade it, I have a right to hinder any one from entering, and to treat as an enemy whomsoever attempts to enter the place, or carry anything to the besieged without my leave; for he opposes my undertaking, and may contribute to the miscarriage of it, and this involves me in all the misfortunes of an unsuccessful war."

"There are two sorts of blockade," says Lord Stowell, in *The Neptunus* (1 Rob. 171), "one by the *simple* fact only, the other by a notification accompanied with the fact. In the former case, when the fact ceases (otherwise than by accident or the shifting of the wind), there is immediately an end of the blockade; but where the fact is accompanied by a public notification from the government of a belligerent country to neutral governments, the blockade must be supposed to exist till it has been publicly repealed, and notification of such repeal made, in the same way, by the belligerent country which has notified the blockade. This notification it is the duty of the belligerent country to make immediately; as, to suffer the fact to cease, and to apply the notification again at a distant time, would be a fraud on neutral nations."

"On the question of blockade, three things must be proved: 1st, the existence of an actual blockade; 2nd, the knowledge of the party; and 3rd, some act of violation, either by going in or by coming out with a cargo laden after the commencement of blockade. On this last point the time of shipment is very material; for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property, yet after the commencement of a blockade, a neutral cannot be allowed to interfere in any way to assist the exportation of the property of the enemy. After the commencement of a blockade a neutral is no longer at liberty to make any purchase in that port." (Lord Stowell in *The Betsey*, 1 Robinson, 92.)

Actual blockade is the most essential element of legal blockade. The blockade of Havre was notified

by Great Britain, 23 Feb. 1798, for the purpose of preventing the invasion of this kingdom by France; but in November, 1799, no blockade of Havre was known to the British navy to be existing (*The Neptunus*, 2 Rob. 110); from that period, through the spring and summer of 1798, vessels were invariably permitted to pass in and out of that port. Many vessels were stopped and examined as to the property of the cargo, and the destination, and on other points, but no objection appears to have been taken on the ground of blockade; some were proceeded against on other grounds, and others were released. The ship *Jungfrau Maria Schroeder* went into Havre in May, 1799, having been met by *The Stag* frigate, and suffered to pass unmolested; she came out again on the 14th June, and saw no ship for forty-eight hours, and was seized at last off the North Foreland, by *The Camperdown* cutter. On the claim, before Lord Stowell, for the restitution of the vessel (3 Rob. 147), it was shown that on the 17th August, 1799, the British Admiralty transmitted orders to the captain of *The Atalanta*, "to proceed as expeditiously as possible to Havre, there to take under his command the ships he should find on that station, for the purpose of blocking up the coast, and watching the motion of the enemy, and protecting the island of St. Marcou till further orders;" but it was not until 27th September that the Admiralty sent orders to this officer "not to permit any vessel, whatever, to enter Havre." It was contended that this was the first declaration since November, 1798, that Havre was considered to be under a mercantile blockade, and that, consequently, between November, 1798, and the receipt of the Admiralty order of 27th September off Havre, the blockade

was to be considered as totally relaxed, which alone by the law of nations is held to operate as a legal cessation. "A blockade," says Bynkershoeck, "is virtually relaxed, *si segnius oræ observatæ sint.*" Lord Stowell, in restoring the vessel, said: "It is perfectly clear, that a blockade had taken place some months before; and that the notification was communicated to the claimant's government, not only that a blockade would be imposed, but of a most rigorous kind; and I cannot entertain the least doubt, that the orders which were given by our Admiralty were conformable to it. It is impossible to suppose that the orders for carrying into effect a great measure, so materially affecting other states, would not be given by government with the utmost exactness. Yet, I cannot shut my eyes to a fact that presses upon the court, that the blockade has not been duly carried into effect. A temporary and forced secession of the blockading force, from the accidents of winds and storms, would not be sufficient to constitute a legal relaxation. But here ships are stopped and examined, and suffered to go in. The master of this particular vessel says, that, in coming out, he saw no ships for forty-eight hours. That might be accidental; but when he entered, they were on the station; yet no attempt was made to prevent him from going in. In other cases, also, it appears that no force was applied for the purpose of enforcing the blockade. There can be no doubt of the intention of the Admiralty, that neutral ships should not be permitted to go in; but the fact is, that it was not in every instance carried into effect. What is a blockade, but to prevent access by force? If the ships stationed on the spot to keep up the blockade will not use their force for that purpose, it is

impossible for a court of justice to say there was a blockade actually existing at that time, so as to bind this vessel. It is in vain for government to impose blockades, if those employed in the service will not enforce them. The inconvenience is very great, and spreads far beyond the individual case; reports are eagerly circulated that the blockade is raised; foreigners take advantage of the information; the property of innocent persons is ensnared, and the honour of our own country is involved in the mistake."

The cargo, however, of vessels restored on the ground of remissness on the part of the blockading force, does not necessarily participate in the indulgence. In condemning the cargo of *The Jungfrau Maria Schroeder*, Lord Stowell said: "This ship was restored on the ground, that having, though by an improper indulgence, been allowed to go in with a cargo, she might be understood to be at liberty to come out with a cargo. The ship was restored; but it by no means follows, that the owners of the cargo stand on the same footing. That may have been shipped, in consequence of criminal orders directing it to be sent on any opportunity of slipping out. It is, therefore, not to be argued, that the release of the ship is any conclusive evidence respecting the cargo. An absolute order during the continuance of a blockade, if executed, must be considered to be a breach of the blockade; nor do I think that a provisional order, directing shipments to be made when the blockade should be raised, will avail for indulgence, should the blockade actually exist at the time when the order is carried into execution. The owners must take upon themselves to answer for the undue execution of the order, and make

the shippers answerable to them. If this rule was not adopted, there would be no end to shipments made during a blockade, whilst there would be nobody at all responsible for such acts of misconduct."

A blockade is then only to be considered as actually existing, when there is a power to enforce it. "The very notion of a complete blockade," said Lord Stowell, in *The Stert* (4 Rob. 66), "includes that the besieging force can apply its power to every point of the blockading state. If it cannot, it is no blockade, at that quarter where its power cannot be brought to bear; and where such a partial blockade is undertaken, it must be presumed, that this is no more than what was foreseen by the blockading state, which, nevertheless, thought proper to impose it to the extent to which it was practicable."

We find, however, from the case of *The Frederick Molke* (1 Rob. 86), that "it is not the absence of the blockading force, nor the circumstance of being blown off by the winds, if the suspension and the reason of the suspension are known, that would be sufficient in law to remove the blockade."

"Not only a single port," says Mr. Serjeant Marshall (On Insurance, B. 1, c. 3, s. 3; 1 Acton, 63), "but a number of ports, and even a great extent of coast, may be blockaded. In the month of March, 1799, the British government notified to all neutral powers, that the ports of Holland were all invested and blockaded by the British forces; and that every vessel, of whatever flag, every cargo, and every bottom, attempting to enter them, would become forfeited by the law of nations, as attempting to carry succour to the besieged. It must be admitted, that in no for-

mer war had the blockading system been pushed to this extent; but this has been not for want of right, but for want of power. If a single port may be blockaded by a single squadron, which has never yet been disputed, a number of squadrons may blockade a certain extent of coast; and if a country possesses the power and means, and will incur the expense and hazard of covering the whole extent of an enemy's coast, it becomes entitled, upon the same principle, to the same exemption from neutral interference, as if, with a single division, it invested a single fortress."

A declaration of blockade to be valid must be accompanied by actual investment. Upon the arrival of the British forces in the West Indies, a proclamation was issued (1st Jan. 1794) by Admiral Jervis, inviting the inhabitants of Martinique, St. Lucie, and Guadaloupe, to put themselves under the protection of the English; and on their refusal, hostile operations were commenced against the various islands, but separately, and in succession, Guadaloupe being captured April 13, 1794. Among the prizes taken was an American ship, *The Betsey* (1 Rob. 93). A question arising as to the legality of the capture, the captors justified the seizure by a statement, "that in January, 1794, Guadaloupe was summoned, and was then put into a state of complete investment and blockade." Lord Stowell said, "the word *complete* is a word of great energy, and we might expect from it to find that a number of vessels were stationed round the entrance of the port to cut off all communication: from the protest I perceive that the captors entertained but a very loose notion of the true nature of a blockade, for it is there stated, 'that on the 1st January, after a general pro-

clamation to the French islands, they were put into a state of complete blockade.' It is a term, therefore, which was applied to all those islands at the same time under the first proclamation. The Lords of Appeal have determined that such a proclamation was not in itself sufficient to constitute a legal blockade. I cannot, therefore, lay it down that a blockade did exist, till the operations of the forces were actually directed against Guadaloupe, in April. It must, however, be allowed on the other side, that the island of Guadaloupe was at that time in a situation extremely ambiguous and critical. It could be no secret in America that the British forces were advancing against this island, and that the planters would be eager to avail themselves of the interference of neutral persons to screen and carry off their property under such a posture of affairs; therefore, ships found in the harbours of Guadaloupe must have fallen under very strong suspicions, and have become justly liable to very close examination. The suspicions besides would be still further aggravated, if it appeared, as in this case, that those for whom the ships were claimed kept agents stationed on the island, and might therefore be supposed to be connected in character and interests with the commerce of the place. It is true, indeed, the Lords of Appeal have since pronounced the island to have been not under blockade; but it was a decision that depended upon a greater nicety of legal discrimination than could be required from military persons, engaged in the command of an arduous enterprise."

A blockade may be more or less rigorous, either for the single purpose of watching the military operations of the enemy, and preventing the egress of their fleet,

as at Cadiz; or, on a more extended scale, to cut off all access of neutral vessels to that interdicted place, which is strictly and properly a blockade; for the other is, in truth, no blockade at all, as far as neutrals are concerned. It is an undoubted right of belligerents to impose such a blockade, though a severe right, and as such not to be extended by construction; it may operate as a grievance on neutrals, but it is one to which, by the law of nations, they are bound to submit; being, however, a right of a severe nature, it is not to be aggravated by mere construction. (Lord Stowell, *The Jungfrau Maria Schroeder*, 3 Robinson, 154.)

The second point to be examined is the knowledge which the neutral may have respecting the blockade of any particular port: since, in order to affect him with the penal consequences of a violation, it is absolutely necessary for him to have been sufficiently informed of the blockade itself. This sufficient information may be communicated to him in two ways: by a formal notification from the blockading power, or by the notoriety of the fact. "To make a notification effectual and valid," said Lord Stowell, in *The Rolla* (6 Rob. 367), "all that is necessary is that it shall be communicated in a credible manner; because, though one mode may be more formal than another, yet any communication which brings it to the knowledge of the party, in a way which could leave no doubt in his mind as to the authenticity of the information, would be that which ought to govern his conduct, and will be binding upon him. It is at all times most convenient that the blockade should be declared in a public and distinct manner, instead of being left to creep out from the consequences produced by it."

"It is certainly necessary," said Lord Stowell, "that a blockade should be intimated to neutral merchants in some way or other. It may be notified in a public and solemn manner by declaration to foreign governments; and this mode would always be most desirable, although it is sometimes omitted in practice; but it may commence also *de facto*, by a blockading force giving notice on the spot to those who come from a distance, and who may therefore be ignorant of the fact. *Vessels going in* are in that case entitled to a notice before they can be justly liable to the consequences of breaking a blockade; but I take it to be quite otherwise with *vessels coming out* of the port which is the object of blockade. There no notice is necessary after the blockade has existed *de facto* for any length of time; the continued fact is itself a sufficient notice. It is impossible for those within to be ignorant of the forcible suspension of their commerce; the notoriety of the thing supersedes the necessity of particular notice to each ship. The sight of one vessel would not certainly be sufficient notice of a blockade." (*The Henrich and Maria*, 1 Rob. 147.)

And again, "A blockade may exist without a public declaration. The fact, duly notified to an individual on the spot, is of itself sufficient; for public notifications between governments can be meant only for the information of individuals; but if the individual is personally informed, that purpose is still better obtained than by a public declaration." (Lord Stowell, *The Mercurius*, 1 Rob. 82.)

Previous warning under treaties is not indispensable. In *The Columbia* (1 Rob. 156), an American vessel, captured by British cruisers, Lord Stowell, in con-

demning the ship and cargo, said, "it has been argued that, by the American treaty, there must be a previous warning; certainly where vessels sail without a knowledge of the blockade a notice is necessary; but if you can affect them with the knowledge of that fact, a warning then becomes an idle ceremony of no use, and therefore not to be required."

The effect of notification to any foreign government is clearly to include all the individuals of that nation. It would be the most nugatory thing in the world if individuals were allowed to plead their ignorance of it. It is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect. A neutral master can never be heard to aver against a notification of blockade that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own government, and may raise a claim of compensation from them, but it can be no plea in the court of a belligerent. It may be different in the case of a blockade *de facto*, where no presumption arises as to the continuance; and the ignorance of the party may be admitted as an excuse for sailing on a doubtful destination; but in the case of a blockade by notification, the act of sailing to a blockaded place is sufficient to constitute the offence. (Lord Stowell, in *The Neptunus*, 2 Rob. 113.)

The effect of notification, as to the subjects of those states to whom it has not been directly made, may not operate upon the subjects of those states from the same time and in the same manner as upon the subjects of those states to whom it has been directly made; but it would be going too far to say that it does not operate

at any time, because if a notification is made to the principal states of Europe, the time may be considered to come when it will affect the rest, not so much *proprio vigore*, or by virtue of the direct act, as in the way of evidence. It is the duty of a state to make the notification as general as possible. Suppose a notification is made to Sweden and Denmark, it would become the general topic of conversation, and it would be scarcely possible that it should not travel to the ears of a Bremen man; and although it might not be so early known to him as to the subjects of the states to which it was immediately addressed, yet in process of time it must reach him, and must be supposed to impose the same observance of it upon him; it would strongly affect him with the knowledge of the fact that the blockade was *de facto* existing. Therefore, though a notification does not, *proprio vigore*, bind any country but that to which it is addressed, yet, in reasonable time, it must affect neighbouring states with knowledge, as a reasonable ground of evidence. It is not to be said by any person, 'although I know a blockade exists, yet, because it has not been notified to my court, I will carry out a cargo.' It would be a very fraudulent omission to take no notice of what is a subject of general notoriety in the place." (Lord Stowell, in *The Adelaide*, 2 Rob. 111.)

Notification of blockade should be made not only to foreign governments, but to the subjects of the state imposing the blockade and to its cruisers; not only to those stationed at the blockaded port, but to others, and especially considerable fleets, that are stationed *in itinere* to such port, from the different trading coun-

tries that may be supposed to have an intercourse with it. (Lord Stowell, *ub. sup.*)

A more definite rule as to the notification of blockade was laid down in the treaty of 1794 between Great Britain and the United States (art. 18): "Whereas it frequently happens that vessels sail for a port or place belonging to an enemy without knowing that the same is either besieged, blockaded or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper."

Due time for the notification of a blockade must be allowed according to circumstances. The recent facilitation of communication by the electric telegraph, and by steam and railway, will of course have lessened the time so to be allowed; but in 1799 Lord Stowell restored a Danish ship (*The Jonge Petronella*), which had been captured off the coast of Holland on the 28th of March, on the ground that the blockade had only been notified to foreign ministers on the 21st of that month, and that he did not think a week sufficient time to affect the parties with a legal knowledge of the blockade. (2 Rob. 131.) In the case of *The Calypso* (Ib. 298) the learned judge condemned the vessel, on the ground that she had taken in cargo at Rotterdam (then blockaded) on the 20th April, when, intelligence of the blockade having been actually known to the Prussian consul at Amsterdam on the 12th, there was time for constructive notice at Rotterdam by the 15th.

When once the notice, actually or constructively, has reached the neutral, he is not permitted to go to the station of the blockading force, upon pretence of inquiring whether blockade has terminated. "The merchant," said Lord Stowell, in *The Spes and Irene* (5 Rob. 76), "is not to send his vessel to the mouth of the river, and say, 'If you don't meet with the blockading force, enter; if you do, ask a warning, and proceed elsewhere.' Who does not at once perceive the frauds to which such a rule would be introductory? The true rule is, that, after the knowledge of an existing blockade, you are not to go to the very station of blockade under pretence of inquiry."

In the case of *The Betsey* (1 Rob. 334), Lord Stowell said: "Ships sailing from neutral ports for ports under blockade must call somewhere to obtain information, for the court will not allow the information to be obtained at the mouth of the blockaded port. The distance of the port of departure is a circumstance to be favourably considered by the court, although not to be held a ground of absolute exemption from the common effect of a notification of a blockade: being at a distance where they cannot have constant information of the state of blockade, whether it is continued or is relaxed, it is not unnatural that they should send their ships conjecturally, upon the expectation of finding the blockade broken up, after it had existed for a considerable time; but the inquiry whether the blockade has so broken up, must be made by such ships at ports that lie in the way, and which can furnish information without furnishing opportunities of fraud, and not at the spot blockaded, or from the blockading vessels."

In adventures from America, the court allowed some relaxation of this rule, on account of the distance of that country. In the case of *The Betsey*, an American vessel, proceeded against as for an intentional breach of the blockade of Amsterdam, Lord Stowell, in releasing the vessel, said: "The ship sailed (from America) in January last, when the owners were certainly informed of the blockade; but the distance of their country is a material circumstance in their favour. I certainly cannot admit that the Americans are to be exempted from the common effect of a notification of a blockade existing in Europe; but I think it is not unfair to say, that, being at such a distance where they cannot have (1799) constant information of the state of the blockade, whether it continues or is relaxed, it is not unnatural that they should send their ships conjecturally, upon the expectation of finding the blockade broken up, after it had existed for a considerable time. A very great disadvantage indeed would be imposed upon them if they were bound rigidly by the rule which justly obtains in Europe, that the blockade must be conceived to exist till the revocation of it is actually notified. For if this rule is rigidly applied, the effect of the blockade would last two months longer upon them than on the trading nations of Europe, by whom intelligence is received almost as soon as it is issued. That the Americans should therefore send their ships upon a fair conjecture that the blockade had, after a long continuance, determined, and for the purpose of making fair inquiry whether it had so determined or not, is, I think, not exceptionable."

The declaration of blockade must be specific, as well

as legal and regular. In *The Henrich and Maria* (1 Rob. 148), Lord Stowell decided that a notification of a general blockade of the coast of Holland, which was untrue in fact, was not available, by limitation or construction, for a blockade of Amsterdam only, though really existing. In this case the captor had warned the master "not to proceed to any Dutch port," and upon his saying he must proceed according to his bill of lading (Amsterdam) had arrested his ship. "This notice," says Lord Stowell, "is, I think, in point of authority, illegal; at the time when it was given there was no blockade which extended to all Dutch ports. A declaration of blockade is a high act of sovereignty, and a commander of a king's ship is not to extend it. The notice is also, I think, as illegal in effect as in authority; it cannot be said that such a notice, though bad for other ports, is good for Amsterdam. It takes from the neutral all power of election, as to what other port of Holland he should go to, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress; and I am of opinion that if the neutral had contravened the notice, he would not have been subject to condemnation." But, from the case of *The Rolla* (6 Rob. 367), it would seem that this limitation of a commander's power is held to subsist only "on stations in Europe, where government is almost at hand to superintend the course of operations; and that a commander going out to a distant station may reasonably be supposed to carry with him such a portion of the sovereign authority delegated to him as may be necessary to provide for the exigencies of the service on which he is employed."

The receipt of the notification, as has been indicated, will not prevent a neutral, who, at the time of receiving it, is lying in the very port blockaded, from retiring freely; and it has even been laid down in the case of *The Betsey*, that he may retire with a cargo which he may already have laden, and which has thereby become actually neutral property: the distinction being, that he is not at liberty to make any fresh purchase after the notification. From the case of *The Rolla* (6 Rob. 367) it appears that the court will hold every cargo to be a fresh purchase which is not delivered, previously to the notification, either on board the neutral ship itself or in lighters.

The breach of a blockade, existing and known, may be either by going into the place blockaded or by coming out of it with a cargo laden after the commencement of the blockade. But, in order to constitute such a going into the blockaded port as will subject the neutral to the penalties of confiscation, it is not necessary that the entrance be completed into the very heart of the harbour. Vessels are not permitted even to place themselves in the vicinity, if their situation be so near that they may, with impunity, break the blockade whenever they please. "If a vessel could, under pretence of proceeding further, approach close to the blockaded port, so as to be in a condition to slip in without obstruction, then," said Lord Stowell, in *The Neutralitet* (6 Rob. 30), "it would be impossible that any blockade could be maintained. It would, I think, be no unfair rule of evidence to hold, as a presumption *de jure*, that she goes there with an intention of breaking the blockade; and if such an inference may possibly operate with severity in particular cases,

where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence, and essential to the effectual exercise of this right of war." Still less is a neutral permitted to place himself in such a situation as to be within the protection of the batteries on the shore. (*The Charlotte Christine*, 6 Rob. 101; *Gute Erwartung*, 6 Rob. 182.)

A blockade is broken as completely by coming out as by going in. "A blockade," said Lord Stowell, in *The Vrow Judith* (1 Rob. 151), "is a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, and a neutral is no more at liberty to assist the traffic of exportation than of importation. The utmost that can be allowed to a neutral vessel is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule, which this court means to apply, that a neutral ship departing can only take away a cargo *bonâ fide purchased and delivered* before the commencement of the blockade. If she afterwards takes on board a cargo, it is a fraudulent act, and a violation of the blockade." "For what is the object of blockade? Not merely to prevent an importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded place. There may be cases of innocent egress, where vessels have gone in before the blockade; and under such circumstances it cannot be maintained that they might not be at

liberty to retire. But even then a question might arise, if it was attempted to carry out a cargo; for that would, as I have before stated, contravene one of the chief purposes of blockade. A ship then, in all cases, coming out of a blockaded port is, in the first instance, liable to seizure; and to obtain release the claimant will be required to give a very satisfactory proof of the innocency of his intentions." (Lord Stowell, in *The Frederick Molke*, 1 Rob. 87.) Nor will any neutral ship be permitted to escape from the penalties of breaking a blockade, because she has escaped the interior circumvallation, and has advanced some way on her voyage; the principle being that a neutral vessel is not at liberty to come out of a blockaded port with a cargo. There is no natural termination of the offence but the end of the voyage. It would be ridiculous to say, if you can but get past the blockading squadron, you are free. (Lord Stowell, in *The Welvaart Van Pillau*, 2 Rob. 130.)

A ship transferred in a blockaded port from one neutral to another, and coming out in ballast, is not a breach of blockade. So too where a neutral has sent in goods before the blockade, which are found unsaleable, or are otherwise withdrawn *bonâ fide* by the owner, they are not subject to condemnation for coming out. (*The Potsdam*, 4 Rob. 89.) Nor will a neutral ship coming out of a blockaded port, in consequence of a rumour that hostilities were likely to take place between the enemy and his own country, be liable to condemnation, though laden with a cargo, where the regulations of the enemy will not permit a departure in ballast. (*The Drie Vrienden*, 1 Dod. 269.) Where a vessel has been purchased in a blockaded port, that alone is the illegal act, and it is imma-

terial out of what funds the purchase is made. Nor can she be said not to be taken *in delicto*, when on her voyage to the country of the purchaser, she has been driven into an intermediate port by stress of weather. (*The General Hamilton*, 6 Rob. 61.) The compulsory sale of cargo in the blockaded port is no excuse of breach of blockade after having gone in voluntarily. (*The Byfield*, Edw. 188.)

There are cases in which the breach of blockade may be excusable. In cases of this nature, the whole burden of exonerating himself from the penal consequences lies upon the party. He must show that he was led into the blockaded port by some accident which he could not control, or by some want of information which he could not obtain. In doing this, he must prove his whole case, and, however innocent his intentions may have been, he must explain his conduct in a way consistent, not only with the innocence of himself and his owner, but he must bring it within those principles which the court has found it necessary to lay down for the protection of the belligerent right, and without which no blockade can ever be maintained. (Lord Stowell, *The Arthur*, 1 Edwards, 203.)

The misinformation of foreign ministers as to alleged cessation of a blockade will not be received as an excuse. In the case of *The Spes and Irene*, amongst other arguments against condemnation (1803), it was urged that the masters had conjecturally been informed by the Consul of Hamburg at Archangel, that the blockade of the Elbe had been raised. Lord Stowell rejected this plea:—"It has been said that no intelligence of the blockade had been received from the Consul of the State of Hamburgh; though I must

presume it had, because, as the notification was made to the Consul (of Hamburg) here in London, it was his duty to make the communication to the consuls of his government in foreign ports; and as the information had arrived at Hamburg, and had been actually communicated from thence to Archangel by private channels, the same communication must be supposed to have been made from public authority to the public minister; or if not, if there had been any neglect, the consequence must be imputed only to the state and its officers, who are answerable to their subjects for the consequences of their neglect. If the information of foreign ministers could be deemed sufficient to exempt a party from all penalty, there would be no end of such excuses. Courts of justice are compelled, I think, to hold as a principle of necessary caution, that the misinformation of a foreign minister cannot be received as a justification for sailing in actual breach of an existing blockade." (5 Rob. 79.)

An excuse for breaking blockade for want of provisions "is an excuse which will not on light grounds be received, because an excuse, to be admissible, must show an imperative and overruling compulsion to enter the particular port under blockade, which can scarcely be said in any case of mere want of provisions. It may induce the master to seek a neighbouring port; but it can hardly ever force a person to resort exclusively to the blockaded port." (Lord Stowell, in *The Fortuna*, 5 Rob. 27.)

In *The Hurtige Hane* (2 Rob. 124), Lord Stowell said,—"It is usual to set up the want of water and provisions as an excuse; and if I was to admit pretences of this sort, a blockade would be nothing more

than an idle ceremony. Such pretences are, in the first instance, extremely discredited on two grounds,—that the fact is strongly against them, and that the explanation is always dubious, and liable to the imputation of coming from an interested quarter. Nothing but an absolute and unavoidable necessity will justify the attempt to enter a blockaded port; considerations of an inferior nature, such as the avoiding higher fees or slight difficulties, will not be sufficient. Nothing less than an unavoidable necessity, which admits of no compromise, and cannot be resisted, can justify the offence."

An excuse for breach of blockade, of purpose to ascertain the land, will be very strictly received. The master of the French vessel *Adonis*, having been seized by one British ship when she came into the bay of Havre, then under blockade, after having been warned off by another English vessel, alleged that he had stood in to ascertain whether the coast was that of France, his mate having asserted the contrary. The alleged statement, however, had been made before the vessel had been spoken by the first English ship; and Lord Stowell condemned the ship, on the ground that, whatever the previous doubts of her crew as to the coast, they might have been removed by inquiring of the first English vessel. The cargo was condemned on the same ground, the deviation to Havre from the alleged destination to Nantes being, in the opinion of the court, entirely for the service of the owner of the cargo. (5 Rob. 256.)

Intoxication on the part of the master will not be received in excuse for the breach of blockade. In the case of *The Shepherdess*, which had pertinaciously

broken the blockade of Havre, Lord Stowell said (5 Robinson, 262): "If such an excuse could be admitted there would be eternal carousings in every instance of violation of blockade. The master cannot, on any principle of law, be permitted to stultify himself by the pretended or even real use of strong liquors, of which, if it were a thing to be examined, the court could in no instance ascertain the truth of the fact. The owners of the vessel have appointed him their agent, and they must in law be bound by his imprudence, as well as by his fraud." Where a master, in a state of intoxication, persists in a course involving a breach of blockade, it is the duty of the supercargo, and of the officers concerned in the navigation of the ship, to dispossess him of the command, and to give a proper direction to the voyage. (*Ib.*)

Positive information from a ship belonging to the blockading power, that a particular port is not blockaded, though erroneous, will be received in favour of a vessel acting upon such information. In the *Neptunus*, Lord Stowell (2 Rob. 110) released the prize, on evidence that the captain of an English frigate had informed the master at sea, that the port to which he was bound—Havre—was not blockaded, and that he might proceed on his destination. "I do not mean," said the learned Judge, "that the fleet could give the master any authority to go to a blockaded port; it is not set up as an authority, but as intelligence affording a reasonable ground of belief, as it could not be supposed that such a fleet as that was, would be ignorant of the fact.

If a place be blockaded by sea, it is no violation of the belligerent rights, for a neutral to carry on

commerce with it inland by inland communications. In the case of *The Ocean* (3 Rob. 297), a case arising out of the blockade of Amsterdam, Lord Stowell decided that the blockade of Amsterdam need not be violated by an order from America, as for a shipment to be made at Amsterdam, the actual shipment having been made at Rotterdam; the interior carriage of the articles from Amsterdam to Rotterdam not being within the scope and operation of the blockade. "In what course the cargo had travelled to Rotterdam—where it first became connected with the ship—whether from Amsterdam at all, and if, from Amsterdam, whether by land-carriage or by one of their inland navigations, Rotterdam being the port of actual shipment, I do not think it material to inquire. The legal consequences of a blockade must depend on the means of blockade, and on the actual or possible application of the blockading force. On the land side, Amsterdam neither was, nor could be, affected by a blockading naval force; it could be applied only externally. The internal communications of the country were out of its reach, and in no way subject to its operation."

While, however, confirming in *The Jonge Pieter* (4 Rob. 89), this principle, with regard to the trade of neutrals, the learned Judge emphatically announced that no such bye-way of trade would be permitted to British subjects. The case being that of goods shipped at London for Embden, with, conjecturally, an ulterior purpose of sending them on to Amsterdam, and the goods being claimed on behalf of an American neutral, Lord Stowell said, "On the first point, supposing the cargo to be American property, I am not inclined to think that it would be affected by the block-

ade, on the present voyage. The blockade of Amsterdam is, from the nature of the thing, a partial blockade, a blockade by sea; and if the goods were going to Embden, with an ulterior destination by land to Amsterdam, or by an interior canal navigation, it is not, according to my conception, a breach of the blockade. But in the case of a British subject, shipping goods to go to the enemy, through a neutral country, I am afraid the penalty would be incurred. Without the licence of government, no communication, direct or indirect can be carried on with the enemy. On the policy of that law, this is not the place to observe; it is the law of England; and if any considerations of mercantile policy interfere with it, the duty of the subject is to submit his case to that authority of the country, which can legalize such a trade, looking to all the considerations of political as well as commercial expediency, that are connected with it. But an individual cannot do this; he is not to say, such a trade is convenient, and therefore legal; neither can the court exercise such a discretion. Where no rule of law exists, a sense or feeling of general expediency, which is in other words common sense, may fairly be applied. But where a rule of law interferes, these are considerations to which the court is not at liberty to advert. In all the cases that have occurred on this question, and they are many, it has been held indubitably clear, that the subject cannot trade with the enemy, without the special licence of government. The interposition of a prior port makes no difference; all trade with the enemy is illegal; and the circumstance, that the goods are to go first to a neutral port, will not make it lawful. The trade is still liable to the same abuse, and to the

same political danger, whatever that may be. I can have no hesitation in saying, that during a war with Holland, it is not competent to a British merchant to send goods to Embden, with a view of sending them forward, on his own account, to a Dutch port, consigned by him to persons there, as in the course of ordinary commerce."

The question of blockade, in relation to rivers flowing through conterminous states, is thus elaborately stated by Lord Stowell, in the leading case of *The Twee Gebroeders*, Northholt master (3 Robinson, 339). The case arose on the capture of vessels in the Groningen Watt, on a suggestion that they were bound from Hamburg to Amsterdam, then under blockade; and a claim was given under the authority of the Prussian minister, averring the place in question to be within the territories of the King of Prussia. Lord Stowell said, "This is the case of a ship and goods proceeded against for a breach of the blockade of Amsterdam; they are claimed as being taken on neutral territory; but it is denied on the part of the captors that they were so taken. On the blockade of Amsterdam, this court has been inclined to hold generally that all sea passages to Amsterdam, by that great body of waters the Zuyder Zee, were blockaded, supposing those sea passages to be in the possession of the enemy; such as were in the possession of neutrals, it was of opinion, were not included, unless the blockading force could be applied at the interior extremity of their communication. Whether the present capture in question was made in a sea passage to the Zuyder Zee, belonging to the enemy or to a neutral power, will be decided by the considerations which are to be examined in the

further pursuit of this question. Secondly, supposing that question determined against the immunity of the place of capture, another question is proposed, whether the belligerent party having passed over neutral territory, *animo capiendi*, to the place where his rights have been exercised, those rights of capture so exercised are not thereby invalidated? The capture is represented on both sides to have been made in the Watt, which runs along the coast of Groningen, by two or three of his Majesty's ships that went up the Eems. It is not, I think, contended that the capturing ships were stationed on the neutral territory, unless the whole of the Watt passage is to be so considered. The precise place where the capturing ships lay is not very distinctly marked; but the balance of evidence inclines to establish that they were on the other side of a line of buoys, which Captain M'Kenzie swears were considered as being on Dutch territory, and that he placed his ship as near as possible in the place where some Dutch armed vessels (which were driven away on his approach) were stationed. On the whole that is to be collected from the evidence as to the exact spot, I am led to suppose that the ships were not stationed on neutral territory, unless the whole of the Watt passage is to be so considered. It is scarcely necessary to observe that a claim of territory is of a most sacred nature. In ordinary cases, where the place of capture is admitted, it proves itself; the facts happen within acknowledged and notorious limits, no inquiry is either required or permitted. But otherwise when it happens in places which the neutral country does not possess by any general principle or by any acknowledged right; in such a case, it being contended by those who

represent the belligerent state, that no right exists, and that, therefore, the capture is free and legal, it can never be deemed an act of disrespect on the part of the foreign tribunal, if it proceeds to inquire into the fact of territorial rights—certainly not with a view of deciding generally upon such rights, but merely with respect to this particular fact of capture—not for the purpose of shaking or invalidating such rights, but that it may enforce a legal observance of them, if the facts on which they depend are competently established. Something has been said in argument of the reverence due to the assertion of princes whose claim is advanced; and this court is disposed to pay the fullest measures of reverence which the case will allow. It is not improper to remark, that it is a question discussed much at length by foreign writers on general law, in what cases the sole assertion of princes is to be taken as conclusive legal proof; and no principle is more universally established among them, than that the mere assertion is not to be received as full and complete proof, or, as *Farrinacius* expresses it, *assertioni principis non statur quando agitur de propriâ ipsius principis, vel de ejus commodo aut intercesse*, and indeed a contrary rule would carry the reverence due to these august personages to an extravagance that derided all reason and justice. Strictly speaking, the nature of the claim brought forward on this occasion is against the general inclination of the law; for it is a claim of private and exclusive property, on a subject where a general, or at least a common use is to be presumed. It is a claim which can only arise on portions of the sea, or on rivers flowing through different states: the law of rivers flowing entirely through the

provinces of one state is perfectly clear. In the sea, out of the reach of cannon shot, universal use is presumed; in rivers flowing through conterminous states, a common use to the different states is presumed. Yet, in both of these there may, by legal possibility, exist a peculiar property, excluding the universal or the common use. Portions of the sea are prescribed for; so are rivers flowing through contiguous states; the banks on one side may have been first settled, by which the possession and property may have been acquired, or cessions may have taken place upon conquests or other events. But the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated by clear and competent evidence.

"The usual manner of establishing such a claim is either by the express recorded acknowledgment of the conterminous states or by an ancient exercise of executive jurisdiction, founded presumptively on an admission of prior settlement or of subsequent cession. One hardly sees a third species of evidence unless it be, what this case professes to exhibit, the decision of some common superior in the case of a contested river. The sea admits of no common sovereign; but it may happen that conterminous states through which a river flows, may acknowledge a common paramount sovereign, who in virtue of his political relation to them may be qualified to appropriate exclusively and authoritatively, the rights of territory over such river to one or other of them." Lord Stowell, after observing upon the natural quality and position of

the place, adds—"there being no evidence of acquisition, no proof of cession, and no direct authority to be derived from the terms of the grant, the whole question is again reduced to usage. If that is proved it is certainly evidence of the most favoured kind. All men have a common interest in maintaining the sanctity of ancient possession, however acquired; ancient landmarks and ancient seamarks are *res sacer-rimæ*, and whoever moves them *piaculum esto*. Then what is the natural evidence to be expected of ancient and constant usage? and how much of this has been produced? How is ancient jurisdiction proved on such a subject? By formal acts of authority, by holding courts of conservancy of the navigation, by ceremonious processions to ascertain the boundaries, in the nature of perambulations, by marked distinctions in maps and charts prepared under public inspection and control, by levying of tolls, by exclusive fisheries, by permanent and visible emblems of power there established, by the appointment of officers specially designated to that station, by stationary guard-ships, by records and muniments, showing that the right had always been asserted, and, whenever resisted, asserted with effect. This is the natural evidence to be looked for generally: and such as it is more particularly reasonable to require, where a right is claimed against all general principles, and also against the natural rights and limits, and, indeed, against the independence and security of neighbouring states. On this evidence then it is impossible for me to pronounce that these captures are invalidated by being actually made on Prussian territory. There remains the other question, whether they are not vitiated, by the capturing

ship having passed over neutral territory, to accomplish the capture? as it is alleged they passed up the Western Eems and that the whole of that is Prussian territory. I have already intimated some doubts that might possibly have been entertained upon the present evidence, whether the Western Eems is to be deemed at all times and at all parts of it clearly Prussian territory; but supposing it to be so, is it a violation of territory to have committed an act of capture, after having passed over this territory to effect it? On this point there are some observations of law and some of fact that appear not unworthy of notice. In the first place, the place of capture is accessible by other passages, not asserted to be neutral; it is not alleged that a hostile force might not have reached these ships by another route, through the Lower Zee or other communications. It is not said that they were so inclosed and protected on all sides by neutral territory, that you could not approach them without passing over it. In the next place, it is not the case of an internal passage into the heart of the country—into the Homegat—if I may adopt their own term; it is a passage over an external portion of water, which you may prescribe for as territory, but not as inland river or as part of the internal territory; it is not the entrance of an armed force, up an inward passage to reach an enemy lying in the interior of the land. Thirdly, it is an observation of law, that the passage of ships over territorial portions of the sea or external water is a thing less guarded than the passage of armies over land, and for obvious reasons. An army in the strictest state of discipline can hardly pass into a country without great inconvenience to the inhabi-

tants; roads are broken up, the price of provisions is raised, the sick are quartered on individuals and a general uneasiness and terror is excited; but the passage of two or three vessels or of a fleet over external waters may be neither felt nor perceived. For this reason the act of inoffensively passing over such portions of water, without any violence committed there, is not considered as any violation of territory belonging to a neutral state—permission is not usually required; such waters are considered as the common thoroughfare of nations, though they may be so far territory as that any actual exercise of hostility is prohibited therein. Fourthly, it is to be observed, that the right of refusal of passage, even upon land, is supposed to depend more on the inconvenience falling on the neutral state, than on any injustice committed to the third party who is to be affected by the permission. Grotius and Vattel both agree that it is no ground of complaint, nor cause of war against the intermediate neutral state, if it grants passage to the troops of a belligerent, though inconvenience may ensue to the state beyond; the ground of the right of refusal being the inconvenience that such passages bring with them to the neutral state itself. This being the general state of the fact and of the law, it would be a proposition which could not be maintained in a full universal extent, that the passing over water claimed as neutral territory would vitiate any ulterior capture made on a third party. Suppose the case of a war between England and Russia, and that the Sound was the pass in question, over which Denmark claims and exercises imperial rights, on stronger grounds than can be maintained in support of this claim, or sup-

pose a war between France and Russia, and the Dardanelles to be the pass in question; or suppose any two powers exercising hostilities in the Mediterranean, after having passed through the straights of Gibraltar, occupied by an English fortress on one side and by Tangier on the other, formerly in possession of this country;—could it be said in any of these cases, that captures made beyond this point of passage over neutral water territory, would be invalidated on any principle of the law of nations. Where a free passage is generally enjoyed, notwithstanding a claim of territory may exist for certain purposes, no violation of territory is committed, if the party, after an inoffensive passage, conducted in the usual manner, begins an act of hostility in open ground. In order to have an invalidating effect, it must at least be either an unpermitted passage, over territory where permission is regularly requested, or a passage under permission obtained on false representation and suggestions of the purpose designed. In either of these cases there might be an original misfeasance and trespass, that travelled throughout and contaminated the whole; but if nothing of this sort can be objected, I am of opinion, that a capture otherwise legal, is in no degree affected by a passage over territory in itself otherwise legal and permitted. (*The Twee Gebroeders*, 3 Rob. 336.)

Interior countries may import and export through an enemy's ports, but in such cases strict proof of property is required. In the *Magnus* (1 Rob. 31), a ship laden with coffee and sugars, and taken on a voyage from Havre to Genoa, the ship having been restored as Danish property, the cargo was claimed

as belonging to a merchant at Basle. After admitting further proof, by plea and proof, Lord Stowell condemned the cargo, on the ground that the owner at Basle, having been trading in articles of France, without special reference to any wants of his own country, appeared before the court only in the character of a general merchant interposing to carry on the trade between France and Genoa with security. "Perhaps," remarked the learned judge, "it would not be going too far to say, that in Swiss cases it would not be unreasonable to require proof rather of a stricter nature than what is usually deemed sufficient in ordinary cases between maritime nations; and I say this only in reference to the situation in which the Swiss stand in being obliged to trade chiefly through other countries, and often, as in this case, through the ports of the enemy. The privilege of carrying on trade in this manner, in time of war, has been allowed to them in common with some of the interior countries of Germany, in consideration of the hardship that they would sustain were they to be altogether restricted from becoming merchants for the supply of their own wants, or for the export of the manufactures and native produce of their own country. It must, however, on all sides be conceded, that on the fairest terms, such a trade would be exposed to great suspicion, and therefore we may be justified in requiring more than ordinary proof—not merely a test affidavit, but the correspondence of the parties, the orders for purchase, and the mode of payment, satisfactorily making out the claimant's case up to the origin of the transaction." The condemnation of *The Active*, on the same principle, was confirmed by the House of Lords (March 10, 1798).

Blockade is not to be evaded by the ships of less civilized powers, though in some instances, and to a certain extent, they may be entitled to a relaxation of the laws of nations. In condemning (3 Rob. 324) the cargo of *The Hurtige Hane*, shipped from Saffee, in Barbary, for Amsterdam (then blockaded), under a false destination to Hamburg, Lord Stowell said: "It has been argued that it would be extremely hard on persons residing in the kingdom of Morocco, if they should be held bound by all the rules of the law of nations, as it is practised amongst European states. On many accounts, undoubtedly, they are not to be strictly considered on the same footing as European merchants; they may on some points of the law of nations be entitled to a very relaxed application of the principles established by long usage between the states of Europe, holding an intimate and constant intercourse with each other. It is a law made up of a good deal of complex reasoning, though derived from very simple rules, and altogether composing a pretty artificial system which is not familiar either to their knowledge or their observance. Upon such considerations, the court has, on some occasions, laid it down that the European law of nations is not to be applied in its full rigour to the transactions of persons of the description of the present claimants, and residing in that part of the world. But on a point like this, the breach of a blockade, one of the most universal and simple operations of war in all ages and countries, excepting such as were merely savage, no such indulgence can be shown. It must not be understood by them that if an European army or fleet is blockading a town or port, they are at liberty

to trade with that port. If that could be maintained, it would render the operations of a blockade perfectly nugatory. They, in common with all other nations, must be subject to this first and elementary principle of blockade, that persons are not to carry into the blockaded port supplies of any kind. It is not a new operation of war; it is almost as old and as general as war itself."

Neutral merchants cannot be allowed to cover enemy's property with other goods belonging to them in the same ship. In condemning *The Eenrom*, a Danish ship which had sailed from Copenhagen to Batavia, with a cargo of tar, sheathing copper, sail cloth, and other articles contraband under treaty between England and Denmark, and captured on the return voyage with a cargo of which half at least was proved to be Dutch property, though collusively alleged to be Danish, Lord Stowell said (2 Rob. 9): "The regular penalty of such a proceeding must be confiscation; for it is a rule of this court which I shall ever hold, till I am better instructed by the superior court, that if a neutral will weave a web of fraud of this sort, this court will not take the trouble of picking out the threads for him in order to distinguish the sound from the unsound; if he is detected in fraud, he will be involved *in toto*. A neutral surely cannot be permitted to say, 'I have endeavoured to protect the whole, but this part is really my property; take the rest, and let me go with my own.' If he will engage in fraudulent concerns with other persons, they must all stand or fall together." (See also *The Betsey and George*, 2 Gallison, 377; *The St. Nicholas*, 1 Wheaton, 417; *The Fortuna*, 3 Wheaton, 236.)

Blockade is not violated by the mere act of the owner sending his vessel on that destination, ignorant of the event, the master having *bonâ fide* changed his course for another port before the capture. In the case of *The Imina*, which had sailed from Dantzig for Amsterdam, but having heard at Elsinore of the blockade of Amsterdam, had shaped its course for Embden, and was captured on its way thither, Lord Stowell restored the vessel, on the ground that "it was not taken *in delicto*, in the prosecution of landing its cargo at a hostile port. It is said, that on the understanding and intention of the owner it was going to a hostile port, and that the intention on his part was complete, from the moment when the ship sailed on that destination; had it been taken at any period previous to the actual variation, there could be no question but that this intention would have been sufficient to subject the property to confiscation; but when the variation had actually taken place, however arising, the fact no longer existed. There was no *corpus delicti* existing at the time of the capture. In this point of view, I think the case is very distinguishable from some other cases, in which, on the subject of deviation by the master into a blockaded port, the court did not hold the cargo to be necessarily involved in the consequences of that act." (3 Rob. 169.) Where a ship has contracted guilt by sailing with an intention of entering a blockaded port, or by sailing out, the offence is not purged away until the end of the voyage; till that period is completed, it is competent to any cruizers to seize and proceed against her for that offence. "When a vessel enters an interdicted port," said Lord Stowell, in the case of *The*

Christiansberg, "the offence is consummated, and the intention is for the first time declared. It is not till the vessel comes out again, that any opportunity is afforded of vindicating the law, and of enforcing the restriction of this order. It is objected, that, if the penalty is applied to the subsequent voyage, it may travel on with the vessel for ever. In principle, perhaps, it might not unjustly be pursued further than to the immediate voyage; but we all know that, in practice, it has not been carried further than to the voyage succeeding, which affords the first opportunity of enforcing the law." (6 Rob. 376.)

"The breach of a blockade," said Lord Stowell, in *The Columbia* (1 Rob. 154), "subjects the property so employed to confiscation. There is no rule of the law of nations more established than this. Among all the contradictory positions that have been advanced in the law of nations, this principle has never been disputed; it is to be found in all books of law, and in all treaties; every man knows it; the subjects of all states know it, as it is universally acknowledged by all governments who possess any degree of civil knowledge."

The violation of blockade by the master affects the ship, but not the cargo, unless the cargo is the property of the same owner, or unless the owner of the cargo is cognizant of the intended violation. In *The Mercurius* (1 Rob. 80), Lord Stowell said: "To maintain that the conduct of the ship will affect the cargo, it will be necessary either to prove that the owners were, or might have been, cognizant of the blockade, before they sent their cargoes, or to show that the act of the master of the ship personally binds them. In America there could not have been any knowledge of the

blockade. The cargo is innocent in its nature, and sets out innocently; the master certainly is the agent of the owner of the vessel, and can bind him by his contract or his misconduct; but he is not the agent of the owners of the cargo, unless expressly so constituted by them. In cases of insurance and in revenue cases, where, it is said, the act of the master will affect the cargo, it is to be observed, that the ground on which they stand, is wholly different. In the former it is in virtue of an express contract which governs the whole case; and in revenue cases it proceeds from positive laws, and the necessary strictness of all fiscal regulations.

"It is argued, that to exempt the cargo from this responsibility will open the door to fraud, if neutrals are allowed to attempt to trade to blockaded ports with impunity, by throwing the blame upon the carrier master; but if such an artifice could be proved, it would establish that *mens rea* in the neutral merchant, which would expose his property to confiscation; and it would, at the same time, be sufficient to cause the master to be considered in the character of agent, as well for the cargo as for the ship. Where a cargo is of a contraband nature, it will, perhaps, justify greater severity; but in cases of contraband it is held that innocent parts of the cargo belonging to other owners shall not be infected."

In strict law every supercargo will bind his employer; and, although cases may arise in which the court will not implicate the owner, as where supercargoes have appeared taking in small parcels of goods, in contradiction to the orders of their employers, the court has thought it hard to involve the interests of

the owners, though, perhaps, strictly responsible; yet, where, as in the case of *The Eenrom*, supercargoes are intrusted with full powers, there seems a deliberate interfering with the war, to mask and withdraw from the belligerent, the property of his enemy, to a large amount, the law must take its course, and the owners must look for redress to the supercargo who has abused his powers. (2 Rob. 8.)

A vessel coming out of a blockaded port with a cargo is *primâ facie* liable to seizure. If the cargo was taken on board after the commencement of the blockade, ship and cargo will be liable to condemnation. In *The Frederick Molke* (1 Rob. 86), Lord Stowell said: "These facts appear on the depositions of the master, that on his former voyage he cleared out from Lisbon to Copenhagen, but was really destined to Havre, if he could escape English cruizers; that he was warned by an English frigate off Havre not to go into Havre, as there were two or three ships that would stop him, but that he slipped in at night and delivered his cargo. It is, therefore, sufficiently proved that there were ships on that station to prevent ingress, and that the master knowingly evaded the blockade; for that a legal blockade did exist, results necessarily from these facts, as nothing further is necessary to constitute blockade, than that there should be a force stationed to prevent communication, and a due notice or prohibition given to the party. But it is still further material that this blockade actually continued till the ship came out again."

In *The Juffrow Maria Schroeder* (3 Rob. 147), the cargo was even placed in a worse situation than the ship; for the ship was restored on the ground of her

having been permitted, by licence, to take a cargo in, and being therefore fairly at liberty to bring a cargo out; but an evil intention appearing on the part of the owners of the cargo to slip it out whenever an opportunity should occur, the cargo was condemned.

The penalty of breaking a blockade attaches on the property of persons ignorant of the fact, by the conduct of the master; or of their consignee, if intrusted with power over the vessel. In *The Columbia* (1 Rob. 154), Lord Stowell said: "This vessel came from America, and, as it appears, with innocent intentions on the part of the American owners: for it was not known at that time in America that Amsterdam was in a state of investment. The master by his instructions was to go to Hamburg, and put himself under the direction of Messrs. Boué & Co. They, therefore, were to have the entire dominion over this ship and cargo. We have this fact, then, that, when the master sailed from Hamburg for Amsterdam, the blockade was perfectly well known, both to him and the consignees; but their design was to seize the opportunity of entering whilst the winds kept the blockading force at a distance. Now, under these circumstances, I have no hesitation in saying that the blockade was broken. The blockade was to be considered as legally existing, although the winds did occasionally blow off the blockading squadron. It was an accidental change which must take place in every blockade, but the blockade is not therefore suspended. The contrary is laid down in all books of authority; and the law considers an attempt to take advantage of such an accidental removal as an attempt to break the blockade, and as a mere fraud."

It is not necessary that the captor should assign any

reason to the master of the offending vessel, at the time of capture; he takes at his own peril, and on his own responsibility, to answer in costs and damages, for any wrongful exercise of the rights of capture. At the same time it may be a matter of convenience, that some declaration should be made; because it is possible, that if the grounds are stated, it may be in the power of the neutral master to give such reasons as may explain away the suspicion that is suggested. (Lord Stowell, *Jungfrau Maria Schroeder*, 3 Rob. 152.)

Though the offence is consummated by the act of sailing, yet if, between the times of sailing and of capture, the blockade has been raised, the offence is held to be wiped away. "The blockade being gone," said Lord Stowell, in *The Lisette* (6 Rob. 395), "the necessity of applying the penalty to prevent future transgression, cannot continue. It is true that the offence incurred by a breach of blockade generally remains during the voyage, but that must be understood as subject to the condition, that the blockade itself continues. When the blockade is raised, a veil is thrown over everything that has been done, and the vessel is no longer taken *in delicto*. The *delictum* may have been completed at one period, but it is by subsequent events done away with."

Officers enforcing a blockade illegally, but through ignorance occasioned by the neglect of their government, must be indemnified by their government. In the case of *The Mentor* (1 Rob. 183), Lord Stowell, said, "If an act of mischief is done by the king's officers, in a place where no act of hostility ought to have been exercised, it does not necessarily follow that mere ignorance of that fact would protect the officers from

civil responsibility. If by articles, a place or district was put under the queen's peace, and an act of hostility was afterwards committed therein, the injured party might have a right to resort to a court of prize for compensation; and if the officer acted through ignorance, his own government must protect him; for it is the duty of government, if they put a certain district within the king's peace, to take care that due notice shall be given to those persons by whose conduct that peace is to be maintained; and if no such notice has been given, nor due diligence used to give it, and a breach of the peace is committed through the ignorance of those persons, they are to be borne harmless at the expense of that government, whose duty it was to have given that notice."

Blockading ships are at liberty to take a prize if it come in their way, but they are not to chase to a distance, for that would be a desertion of their duty of blockade (*La Melanie*, 2 Dod. 130); but chasing suspicious vessels in the neighbourhood of a blockaded port by the blockading squadron is held not to work a cessation of the blockade. (*The Eagle*, 1 Acton, 65.)

The latest case which has occurred on the subject of blockade is that of the English brig *Fame*, which was condemned at Paris on the 23rd of February, 1849, for an alleged breach of the blockade of Buenos Ayres, established by England and France in the Rio de la Plata. It was contended in that case that the condemnation was illegal, mainly on the ground that the blockade had not been fairly enforced by the French squadron. The whole of this question is discussed in a pamphlet recently published by M. Bellemare, entitled "Questions Importantes d'Actualité, Droits des Neutres, &c." Pau, 1854.

COASTING TRADE.

There is a species of commerce which either belligerent forbids to neutral states in time of peace, but permits to them to enjoy in time of war; possibly, indeed, with a fair design, but more probably with the fraudulent and collusive intention of covering and withdrawing his own possessions from the grasp of his enemy's hostility. The possibility of fair dealing makes it impracticable to decide, *ipso facto*, on any particular adventure, that it is fraudulent and collusive; and therefore, on the other hand, the strong probability of fraud and collusion has made it necessary for the other belligerents to declare that such adventures shall not be tolerated at all.

The principal branches of trade which are thus incessantly liable to abuse, and from which it has therefore been deemed necessary that neutrals shall be totally excluded, are the enemy's coasting trade, and the enemy's colonial trade.

"Is it," asked Lord Stowell, in *The Emanuel* (1 Rob. 300), "nothing like a departure from the strict duties imposed by a neutral character and situation to step in to the aid of the depressed party, and take up a commerce, which so peculiarly belonged to himself, and to extinguish which was one of the principal objects, and proposed fruits of victory? Is not this, by a new act, and by an interposition neither known nor permitted by that enemy in the ordinary state of his affairs, to give a direct opposition to the efforts of the conqueror, and to take off that pressure which it is the very purpose of war to inflict, in order to compel the conquered to a due sense and observance of justice? As to the coasting-trade, supposing it to

be a trade not usually open to foreign vessels, can there be described a more effective accommodation that can be given to an enemy during a war, than to undertake it for him during his own disability? Is it nothing that the commodities of an extensive empire are conveyed from the parts where they grow and are manufactured, to other parts where they are wanted for use? It is said, that this is not importing anything new into the country, and it certainly is not; but has it not all the effects of such an importation? Suppose that the French navy had a decided ascendant, and had cut off all British communication between the northern and southern parts of this island, and that neutrals interposed, to bring the coals of the north for the supply of the manufacturer, and for the necessities of domestic life in this metropolis, is it possible to describe a more direct and more effectual opposition to the success of French hostility, short of an actual military assistance in the war?" The duties of neutrality are clearly expressed in Lord Howick's letter to Mr. Rist (10 Cobbett's Parl. Deb. 406), in the following words:—"Neutrality, properly considered, does not consist in taking advantage of every situation between belligerent states, by which emolument may accrue to the neutral, whatever may be the consequences to either belligerent party; but in observing a strict and honest impartiality, so as not to afford advantage, in the war, to either; and particularly in so far restraining its trade to the accustomed course, which is held in time of peace, as not to render assistance to one belligerent in escaping the effect of the other's hostilities. The duty of a neutral is '*non interponere se bello, non hoste imminente hostem eripere;*' and yet it is manifest that lending a

neutral navigation to carry on the coasting-trade of the enemy, is in direct contradiction to this definition of neutral obligations, as it is, in effect, to rescue the commerce of the enemy from the distress to which it is reduced by the superiority of the British navy, to assist his resources, and to prevent Great Britain from bringing him to reasonable terms of peace."

The strict ancient law, and the modern relaxations, are thus collected and digested in the reply of the King's Advocate in *The Johanna Tholen* (6 Robinson, 72).

"The principle on which this country formerly acted was to consider neutral vessels altogether excluded from the coasting trade of the enemy, under the penalty of condemnation. In later times, which have admitted many relaxations in favour of the navigation of neutral states, the penalty on vessels so employed in an open and undisguised manner has been reduced to a forfeiture of freight. But if that penalty attends the carrying on the coasting trade of the enemy, in an open and undisguised manner, it is natural to expect greater rigour in cases accompanied with a concealment of the purpose and a falsification of all the ordinary documents, which are by the law of nations required to disclose the real nature of the voyage. In such cases, the course which this court has pursued in various instances has been to resort to the more strict principle of former times, and to hold the vessel herself subject to confiscation. Two cases on this point are *The Edward* (4 Rob. 68) and *The Hoffnung* (2 Rob. 162). In the former case, some observations passed in argument and in the judgment on the quality of the cargo, which was wine, going to the neighbourhood of Brest; the latter was a cargo of wine also going to

Morlaix. But in that case the court observed only on the nature of the voyage between the enemy's ports with a false destination; and expressly noticed the distinction between an open and colourable destination, and the necessity of adhering to the more strict principle of condemnation, in cases aggravated by a falsification of the ship's papers. A doubt has been raised as to the competency of a Prize Court to apply confiscation, as it is termed, in the way of penalty. But that argument has more than once been rejected by the Court of Appeal; and in one case more particularly, when the late Lord Rosslyn distinctly observed upon it—"that it had at all times been the practice, and must, in some measure, always attend the questions which a Court of Prize is called upon to decide."

But the relaxation of the ancient penalty was not suffered to take effect, when, in addition to the generally obnoxious nature of the trade itself, there appeared to be circumstances of specific fraud in the individual instance. For example, in *The Johanna Tholen*, the court held, that the carrying on of the enemy's trade with false papers subjected the ship to confiscation; and in *The Ebenezer* (6 Rob. 250; and see *The Carolina*, 3 Rob. 75), the same sentence was pronounced with respect to the cargo, which happened in that instance to be the property, not of an enemy, but of the neutral himself. For it is impossible not to feel that the fabrication of false papers (*The Phœnix*, 3 Rob. 191), which are intended to deceive the captors respecting the vessel's real destination, is a gross aggravation of the guilt originally incurred, by the simple act of illegal traffic.

COLONIAL TRADE.

A neutral may not engage in the colonial trade of the enemy. "Upon the breaking out of a war," says Lord Stowell, in *The Immanuel* (2 Robinson, 197), "it is the right of neutrals to carry on their *accustomed trade*, with an exception of the particular cases of a trade to blockaded places, or in contraband articles (in both which cases their property is liable to be condemned), and of their ships being liable to visitation and search; in which case, however, they are entitled to freight and expenses. I do not mean to say that in the accidents of a war the property of neutrals may not be variously entangled and endangered: in the nature of human connections it is hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it. These inconveniences are more than fully balanced by the enlargement of their commerce; the trade of the belligerents is usually interrupted in a great degree, and falls in the same degree into the lap of neutrals. But without reference to accidents of the one kind or the other, the general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title than by the success of one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his

title; and such I take to be the colonial trade, generally speaking.

"What is the colonial trade *generally speaking?* It is a trade generally shut up to the exclusive use of the mother country to which the colony belongs, and this to a double use—that of supplying a market for the consumption of native commodities, and the other of furnishing to the mother country the peculiar commodities of the colonial regions. To these two purposes of the mother country the general policy respecting colonies belonging to the states of Europe has restricted them. With respect to other countries, generally speaking, the colony has no existence; it is possible that indirectly and remotely such colonies may affect the commerce of other countries. The manufactures of Germany may find their way into Jamaica or Guadaloupe, and the sugar of Jamaica or Guadaloupe into the interior parts of Germany, but as to any direct communication or advantage resulting therefrom, Guadaloupe and Jamaica are no more to Germany than if they were settlements in the mountains of the moon; to commercial purposes they are not in the same planet. If they were annihilated it would make no chasm into the commercial map of Hamburg. If Guadaloupe could be sunk in the sea by the effect of hostility, at the beginning of a war, it would be a mighty loss to France, as Jamaica would be to England, if it could be made the subject of a similar act of violence. But such events would find their way into the chronicles of other countries, as events of disinterested curiosity, and nothing more.

"Upon the interruption of a war, what are the rights of belligerents and neutrals respectively re-

garding such places? It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is his common right, but he has the certain means of carrying such a right into effect if he has a decided superiority at sea. Such colonies are dependent for their existence, as colonies, on foreign supplies; if they cannot be supplied and defended, they must fall to the belligerent of course; and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it; he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent; and to say, 'True it is, you have, by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing its benefits prevent its progress. You have in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we had never presumed to interfere; but we will interpose to prevent his absolute surrender, by means of that very opening which the prevalence of your arms alone has effected; supplies shall be sent, and their products shall be exported; you have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories, and your blood and treasure have been expended, not for your own interest, but for the common benefit of others.'

"Upon these grounds, it cannot be contended to be a right of neutrals to intrude into a commerce which

had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies, and to export their products, affects to open them to neutrals, it is not his will but his necessity that changes his system—that changes the direct and unavoidable consequence of the compulsion of war—it is a measure not of French councils, but of British force.

"Upon these and other grounds, which I shall not at present enumerate, an instruction issued at an early period for the purpose of preventing the communication of neutrals with the colonies of the enemy, intended, I presume, to be carried into effect on the same footing on which the prohibition had been legally enforced in the war of 1756; a period when, Mr. Justice Blackstone observes, the decisions on the law of nations proceeding from the Court of Appeals were known and revered by every state in Europe.

"Upon further inquiry it turned out that one favoured nation, the Americans, had in times of peace been permitted, by special convention, to exercise a certain very limited commerce with those colonies of the French, and it consisted with justice that that case should be specially provided for; but no justice required that the provision should extend beyond the necessities of that case; whatever goes beyond is not given to the demands of strict justice, but is matter of relaxation and concession.

"Different degrees of relaxation have been expressed in different instructions issued at various times during the existence of the war. It is admitted that no such relaxation has gone the length of authorizing a direct

commerce of neutrals between the mother country of the enemy and its colonies; because such a commerce could not be admitted without a total surrender of the principle; for allow such a commerce to neutrals, and the mother country of the enemy recovers, with some increase of expense, the direct market of the colonies and the direct influx of their productions; it enjoys as before the duties of import and export, the same facilities of sale and supply, and the mass of public inconvenience is very slightly diminished. Even supposing that this trade is carried on with integrity (which it is difficult to hope under all the temptations and opportunities of fraud which a direct intercourse will supply), there is every reason to believe that the ancient monopoly will in effect revive itself without the aid of exclusive prohibitions. The force of long established connection and of ancient habits of trade would in a great measure preserve for a time to the mother country its ancient exclusive commerce with colonies, although the communication might be legally open to the merchants of other countries.

"Much argument has been employed on grounds of commercial analogy—this trade is allowed—that trade is not more injurious. Why not that to be considered as equally permitted? The obvious answer is, that the true rule to this court is the text of the instructions; what is not found therein permitted is understood to be prohibited, upon this plain principle, that the colony trade is generally prohibited, and that whatever is not specially relaxed, continues in a state of interdiction. The utmost that could be contended would be, that a commerce exactly *ejusdem generis et gradus* would be entitled to the favour of the permis-

sion; but the relaxation is not to be extended by construction, particularly where authority has been gradual in its relaxation: where it has distinguished and stopped short in several stages, individuals have no right to go further, upon a private speculation of their own, that authority might as well have gone further. It is argued that the neutral can import the manufactures of France to his own country, and from thence directly to the French colony. Why not immediately from France, since the same purpose is effected? It is to be answered, that it is effected in a manner more consistent with the general rights of neutrals, and less subservient to the special convenience of the enemy. If a Hamburg merchant imports the manufactures of France into his own country (which he will rarely do if he has like manufactures of his own, but which in all cases he has an uncontrolable right to do) and exports them afterwards to the French colony, which he does not in their original French character, but as goods which, by importation, had become a part of the national stock of his own neutral country, they come to that colony with all the inconvenience of aggravated delay and expense. So if he imports from the colony to Hamburg, and afterwards to France, the commodities of the colony, they come to the mother country under a proportionable disadvantage; in short, the rule presses upon the supply at both extremities; and therefore if any considerations of advantage may influence the judgment of a belligerent country in the enforcement of the right, which upon principle it possesses, to interfere with its enemy's colonial trade, it is in that shape of this trade that considerations of this nature have their chief and most effective operation.

"It is an argument rather of a more legal nature than any derived from those general topics of commercial policy, that variations are made in the commercial systems of every country in wars and on account of wars, by means of which neutrals are admitted and invited into different kinds of trade from which they stand usually excluded, and if so, no one belligerent country has a right to interfere with neutrals for acting under variations of a like kind made for similar reasons in the commercial policy of its enemy. And certainly if this proposition could be maintained without any limitation, that wherever any variation whatever is made during a war and on account of the state of war, the party who makes it binds himself on all the variations to which the necessities of the enemy can compel him, the whole colony trade of the enemy is legalized, and the instructions which are directed against any part are equally unjust and impertinent; for it is not denied that some such variations may be found in the commercial policy of this country itself, although some that have been cited are not exactly of that nature."

These doctrines were fully confirmed by the Court of Appeal in the case of *The Wilhelmina* (4 Rob. App. A.). Again, in *The Providentia* (2 Rob. 150), Lord Stowell remarked, "Much has been said on the policy and general reasoning of restricting the trade with the colonies of the enemy during a war; this is a wide field, into which I shall not enter any farther than is necessary. I shall look principally to the king's instructions to his cruisers as the safest guide for this court to follow; all reasoning on general principles on this subject depends much on facts of a very dubious

nature, not sufficiently known here, either to the counsel or to the court; and as the superior court has not given any rule for the direction of this court, I shall think it the safest method to adhere to the king's instructions, and exact from them what I conceive to be the meaning of them.

The first instructions were, to bring in all ships which had been trading with any colony of the enemy: but this country afterwards receded from these directions, and the second orders were, 'to bring in all ships laden with the produce of the West India Islands, coming directly from the said islands to any port of Europe.' I cannot but consider this as an abandonment of the former law, and I cannot but think that a cruizer taking this instruction, in conjunction with those which had been given before, must have inferred that it was no longer the intention of government to bring in, and much less to confiscate, cargos of West India produce, unless coming to some port in Europe; this was followed by instructions now in force (1798), which direct the bringing in of all vessels laden with the produce of the French and Spanish settlements, coming directly from the ports of such settlements to any port of Europe, other than the ports of that country to which the vessel belongs. It is certainly not laid down in the negative that they shall not bring in such vessels as are coming from such settlements to their own ports; but, looking at the former instructions, I think it was a strong admonition to cruizers not to bring in such ships, and I believe it has been generally so understood and acted upon by them; and in this court, cargos brought from *Surinam* to ports

in Europe to which the vessels belonged, have been uniformly on proof of the neutrality of the property."

It was in the year 1756 that the strict rule here stated was, for the first time, practically established and universally promulgated, the case which demanded its application having then, for the first time, occurred. It has therefore become generally known by the title of "the rule of the war 1756; by which every one understands the rule that neutrals are not to carry on, in time of war, a trade which was interdicted to them in time of peace."

The prohibition, however, to neutrals to avail themselves of the relaxations extended by belligerents, reaches only to those cases where such relaxations did not exist in time of peace. Where the relaxation did exist in time of peace, its benefit is continued to the neutral during war; in accordance with the leading rule, which enjoins that war shall not place the neutral in a worse situation than that in which he would have found himself if peace had continued.

"During the war between England and America, and the several powers of Europe that interfered to foment those differences," writes Dr. Robinson (Reports, vol. 4, App.), "the principle was altogether intermitted—and on this ground, that France had professed, a short time before the commencement of hostilities, to have altogether abandoned the principle of monopoly, and meant, as a permanent regulation, to admit neutral merchants to trade with the French colonies in the West Indies. The event proved the falsehood of that representation; but, for a time, the effect was the same. The Court of Admiralty of this country did not, during that war, apply the principle

or interrupt the intercourse of neutral vessels in that branch of commerce more than in any other.

"Soon after the commencement of the late war (Nov. 6, 1793), the first set of instructions that issued were framed, not on the exception of the American war, but on the antecedent practice; and directed cruizers 'to bring in, for lawful adjudication, all vessels laden with goods, the produce of any colony of France, or carrying provisions or supplies for the use of any such colony.' The relaxations that have since been adopted have originated chiefly in the change that has taken place in the trade of that part of the world, since the establishment of an independent government on the Continent of America. In consequence of that event, American vessels had been admittted to trade in some articles, and on certain conditions, with the colonies both of this country and France. Such a permission had become a part of the general commercial arrangement, as the ordinary state of their trade in time of peace. The commerce of America was therefore abridged by the foregoing instructions, and debarred of the right generally ascribed to neutral trade in time of war, that it may be continued, with particular exceptions, on the basis of its ordinary establishment. In consequence of representations made by the American government to this effect, new instructions to our cruizers were issued on the 8th January, 1794, apparently designed to exempt American ships trading between their own country and the colonies of France. The directions were, 'to bring in all vessels laden with goods, the produce of the French West India Islands, and coming directly from any port of the said islands to any port in Europe.'

"In consequence of this relaxation of the general principle, in favour of American vessels, a similar liberty of resorting to the colonial market for the supply of their own consumption was conceded to the neutral states of Europe. To this effect, a third set of public instructions was issued on the 25th January, 1798, which recited, as the special course of further alteration, the present state of the commerce of this country, as well as that of neutral countries, and directed cruizers 'to bring in all vessels coming with cargos, the produce of any island or settlement belonging to France, Spain or Holland, and coming directly from any port of the said islands or settlements to any port of Europe, not being a port of this kingdom, nor a port of the country to which such ships, being neutral ships, belonged.'

"Neutral vessels were, by this relaxation, allowed to carry on a direct commerce between the colony of the enemy and their own country; a concession rendered more reasonable by the events of war, which, by annihilating the trade of France, Spain and Holland, had entirely deprived the states of Europe of the opportunity of supplying themselves with the articles of colonial produce in those markets. This is the sum of the general rule, and of the relaxations in the order in which they have occurred."

"On the other hand," writes Chancellor Kent (i. 90), "the government of the United States constantly and earnestly protested against the legality of the rule to the extent claimed by Great Britain; and they insisted in their diplomatic intercourse that the rule was an attempt to establish 'a new principle of the law of nations,' and one which subverted 'many other principles of great importance, which have heretofore

been held sacred among nations.' They insisted that neutrals were of right entitled 'to trade, with the exception of blockades and contrabands, to and between all ports of the enemy, and in all articles, although the trade should not have been opened to them in time of peace.' (Mr. Monroe's Letter to Lord Mulgrave, Sept. 23, 1805; Mr. Madison's Letter to Messrs. Monroe and Pinckney, May 17, 1806.) It was considered to be the right of every independent power to treat, in time of peace, with every other nation for leave to trade with its colonies, and to enter into any trade, whether new or old, that was not of itself illegal and a violation of neutrality. One state had nothing to do with the circumstances or motives which induced another nation to open her ports. The trade must have a direct reference to the hostile efforts of the belligerents, like dealing in contrabands, in order to render it a breach of neutrality." Upon the whole, the principle of the rule of 1756 may very fairly be considered as one unsettled and doubtful, and open to future and vexed discussion, although," concludes Chancellor Kent, "should the United States attain that elevation of maritime power and influence which shall prove sufficient to render it expedient for her maritime enemy to open all her domestic trade to enterprising neutrals, her government might be induced to feel more sensibly than it has hitherto done the weight of the arguments in favour of the policy and equity of the rule."

In the case of *The Juliana* (4 Rob. 336), which was the case of a neutral vessel sailing between France and Senegal, then a French colony, the court having ascertained, after much investigation, that France had

been accustomed to leave open the trade of Senegal to foreign ships, as well before as since the war, restored the vessel to the neutral claimants.

The Danish ship *Wilhelmina* (2 Rob. 101) was taken on a voyage from a hostile colony to a port of Europe, which was not a port either of this kingdom or of the country to which the ship or cargo belonged. It was therefore considered as a case not falling within the protection of the instructions, and a condemnation ensued. In the case, indeed, of *The Hector* (4 Rob. App.), and in the subsequent case of *The Sally* (*Ib.*), the instructions appear to have been construed a little more favourably than their tenor dictated. These were cases of American ships, captured on voyages from hostile colonies in the West Indies to another West Indian Island, that of St. Thomas, which was then a neutral possession. The trade thus carried on by the American neutrals was not to any port of this kingdom, nor to a port of their own country, and upon principle would therefore have been subject to confiscation; but the instructions had directed the capture only of ships coming from the hostile colonies to Europe; and as this produce had not been carried out of the West Indies, it was restored, although it should seem, that, even without any instructions at all, the trade was inherently illegal. However, it was thought right at that time to put a liberal interpretation on the instructions, and to consider as exempted that which was not specifically included; though, in *The Sally*, the court professed merely to act on the authority of *The Hector*, and intimated that, if the question had been a new one, their decision would have been different. In the case of *The Lucy* (4 Rob. App.), an

attempt was made by a neutral claimant to extend the indulgence still further. It was the case of a neutral Swedish vessel, taken on a voyage from a hostile colony to a neutral American port. Here, too, the adventure was certainly not pointed out for confiscation by the letter of the instructions; but the court thought proper to decide upon the principle, which they did not conceive to have been in this instance relaxed by the instructions; and they therefore proceeded to condemnation. The Master of the Rolls pronounced judgment to the following effect:—"In the case of *The Sally*, the court thought they were going further than they should have been disposed to go, if it had not been for the authority of *The Hector*. Now we are required to go farther. In neither of these cases was the produce of the colonies carried out of the West Indies. If an American vessel would not be permitted to trade from St. Domingo to Sweden, there can be no reason why the same rule should not be applied to Swedish vessels trading between the colony of the enemy and America."

On the other hand, in the case of *Margaretha Magdalena* (2 Rob. 138), which was the case of a ship captured on a voyage *bonâ fide* from a hostile colony to her own port, the protection of the instructions was held to be fairly applicable, and the property was restored.

In the case of *The Providentia* (2 Rob. 142), a vessel having been captured in a trade with a hostile colony, which trade, even in time of war, was not generally open to all neutrals, but permitted only to particular persons by special passes or licences, it was contended, on the part of the captors, that the instruc-

tions were not meant to protect these adventures, but merely to exempt that trade, which was generally open to all neutrals. But the court thought proper to put a more liberal interpretation on the instructions. "If," said Lord Stowell, "a distinction was intended between cases of trade generally open, and cases in which a special licence or pass is necessary, that distinction ought to have been expressly inserted in the instructions as an exception. There is nothing in the general terms to direct neutrals to such interpretation. It would be, therefore, to operate with surprise upon them, and to mislead them into a trade to their own undoing, to put such an interpretation upon the king's instructions. Unless it can be shown that it was the particular meaning of the instructions to except vessels under this licence, I must hold that it is not in the terms of them to inquire whether they are going with a pass or not. So I understand them, and till I am instructed to the contrary by the superior court, I shall so interpret them, as importing a general permission, and as not affected by the special licence, the law being simple and universal in its language, and there being nothing to lead me to think that there was any such reserve in the mind of the legislature."

But it is not possible, consistently with the justice which a belligerent nation owes to herself, to exercise this liberality of interpretation towards neutrals in all cases. In that of *The Rendsborg* (4 Rob. 121), a contract had been made between a neutral merchant and the Dutch East India Company, with the avowed object of securing the Dutch property from English hostility. The adventure, it is true, was to Copenhagen, the port of the neutral merchant himself, and

therefore, by the letter of the instructions, appeared to be legal; but the court was of opinion that a commerce, formed with such express views, facilitated as it was by the enemy with peculiar privileges, and conducted on so immense a scale, was not to be considered as a neutral traffic, though the property did really belong to the neutral merchants who claimed it. "It is a possible thing," said Lord Stowell, "that the commerce may not be neutral, although the property is; and if that is the case, the mere neutral ownership will not be a sufficient title to restitution. With respect to the avowed object of the enemy in entering into the contract, namely, the view of preserving his property from British capture, it has been argued that the motive does not concern the buyers; that the motive of the sellers is nothing to the buyers is laid down as a position true in the most unlimited extent. I think that is advanced a little too largely, because if the motive is disclosed it is possible that the duties of neutrality may, on the disclosure of such a motive, create some new obligations on the neutral purchaser, arising from his relation to the other belligerent; the grand fundamental duty of neutrality being, that he is not to relieve one belligerent from the infliction of his adversary's force, knowing the situation of affairs upon which the interposition of his act would have such a consequence. Neutrals may not be bound to inquire very accurately; but if it is clearly declared, either by the fact itself or *à fortiori*, by express acknowledgments, they are bound to take notice of it and regulate their conduct accordingly. If one belligerent is in a state of distress, created by the superiority of his enemy, and on that account gives invita-

tions to neutrals for other pretended reasons, it is not necessary for me to say how far the neutral is bound to scrutinize the truth of those reasons, and to decline, in all cases, a beneficial invitation upon his own private surmises. But if a belligerent come and say, I am in the utmost distress; my enemy is all powerful; without your assistance I am a lost man; in such a case it is an invitation which he is manifestly not at liberty to accept. He cannot afford such assistance, without being guilty of a direct interposition in the war. Nor does it affect the justice of the case at all, that such assistance is not given gratuitously; though done *lucrandi causâ*, it is not less an unlawful interposition. A man does not send contraband out of pure love of the enemy, but with a view of obtaining advantage to himself from the relief of the enemy's distress. If it is a sound principle of the law of nations, that you are not to relieve the distresses of one belligerent to the prejudice of another, any advantage that you may derive from such an act will not make it lawful. The adversary has a full right to destroy his commerce. By his own confession the adversary is effecting this. He has the power as well as the right, and you are not from a prospect of advantage to yourself, or from any other motive, to step in, on every outcry for help, and rescue him from the gripe of his adversary."

The colonial trade which a neutral may not carry on directly, he may not carry on circuitously. "An American," said Lord Stowell, in *The Polly* (2 Rob. Rep. 361), "has undoubtedly a right to import the produce of the Spanish colonies for his own use, and after it is imported *bonâ fide* into his own country he

would be at liberty to carry them on to the general commerce of Europe. Very different would such a case be from the Dutch cases, in which there was an original contract from the beginning, and under a special Dutch licence, to go from Holland to Surinam and to return to Holland with a cargo of colonial produce. It is not my business to say what is universally the test of a *bonâ fide* importation. It is argued that it would not be sufficient that the duties should be paid and that the cargo should be landed. If these criteria are not to be resorted to, I should be at a loss to know what should be the test; and I am strongly disposed to hold that it would be sufficient that the goods should be landed and the duties paid."

On this point Chancellor Kent (Com. i. 92, note) says, "It is understood that the English and American commissioners, at London in 1806, came to an understanding as to the proper and defined test of a *bonâ fide* importation of cargo into the common stock of the country, and as to the difference between a continuous and an interrupted voyage. But the treaty so agreed on was withheld by President Jefferson from the Senate of the United States, and never ratified. The doctrine of the English Admiralty is just and reasonable on the assumption of the British rule, because we have no right to do covertly and insidiously what we have no right to do openly and directly. That rule is, that a direct trade by neutrals between the mother country and the colonies of her enemy, and not allowed in time of peace, is by the law of nations unlawful. But if that rule be not well founded, all the qualifications of it do not help it; and in the official opinion of Mr. Wirt (the Attorney-General of the United States)

to the executive department, while he condemns the legality of the rule itself, he approves as just in the abstract the English principle of continuity."

Next arises the question, what shall be considered a fair importation for the use of the neutral, and what shall be considered only a colourable importation to protect the enemy's adventures. So many cases had occurred where the importation from the hostile colony into the neutral country had been merely fraudulent, the produce being in truth hostile property covered by a neutral name, and destined for the mother country of such hostile colony, that it had become very difficult for the court to decide what species of importation should be deemed a fair and honest importation, sufficient to break the continuity of the voyage and relieve the neutral from the suspicion of hostile collusion. The question at length was discussed upon an appeal before the Lords Commissioners in the case of *The William* (5 Rob. 387), and the Master of the Rolls, in giving judgment, expressed himself to the following effect:—"What, with reference to this subject, is to be considered a direct voyage from one place to another? Nobody has ever supposed that a mere deviation from the straightest, and a shortest course in which the voyage could be performed, would change its destination and make it cease to be a direct one within the intendment of the instructions. Nothing can depend on the degree or the direction of the deviation, whether it be of more or fewer leagues; whether towards the coast of Africa or towards that of America. Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the

course of it. Nor will it the more change, because a party may choose arbitrarily, by the ship's papers or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again to the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done. Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? The truth may not always be discernible, but when it is discovered, it is according to the truth, and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have ended. That those acts have been attended with trouble and expense, cannot alter their

quality or their effect. The trouble and expense may weigh as circumstances of evidence to show the purpose for which the acts were done, but if the evasive purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colourable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same: but there is this difference between them; the landing of the cargo, the entry at the custom-house, and the payment of such duties as the law of the place requires, are necessary ingredients in a genuine importation; the true purpose of the owner cannot be effected without them. But, in a fictitious importation, they are mere voluntary ceremonies which have no natural connection whatever with the purpose of sending on the cargo to another market, and which, therefore, would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage, which he has resolved to continue, the appearance of being broken by an importation which he has resolved not really to make."

In consequence of some complaints of the conduct of our Vice-Admiralty Court, on the part of America, an official correspondence took place between Lord Hawkesbury and Mr. King, in 1801, in the course of which the advocate general, on the 16th of March in that year, in his official character, made the following report as to the law concerning the colonial trade:—"The general principle respecting the colonial trade

has, in the course of the present war, been relaxed to a certain degree in consideration of the present state of commerce. It is now distinctly understood, and has been repeatedly so decided by the High Court of Appeal, that the produce of the colony of an enemy may be imported by a neutral into his own country, and may be re-exported thence even to the mother country of such colony; and, in like manner, the produce and manufacture of the mother country may, in this circuitous mode, legally find their way to the colony. The direct trade, however, between the mother country and its colonies has not, I apprehend, been recognized as legal either by his majesty's government or by his tribunals. What is a direct trade, or what amounts to an intermediate importation into the neutral country, may sometimes be a question of some difficulty. A general definition of either, applicable to all cases, cannot well be laid down. The question must depend upon the particular circumstances of each case. Perhaps the mere touching in the neutral country to take fresh clearances may properly be considered as a fraudulent evasion, and is, in effect, the direct trade (see 1 Acton, 171); but the High Court of Admiralty has expressly decided (and I see no reason to expect that the Court of Appeal will vary the rules), that landing the goods and paying the duties in the neutral country breaks the continuity of the voyage, and is such an importation as legalizes the trade, although the goods be reshipped in the same vessel and on account of the same neutral proprietors, and be forwarded for sale to the mother country or the colony." It is said, that in the case of *The Essex* (5 Rob. 369), contrary to prior determinations, it was

decided in the Court of Appeal, that if an American ship which has exported goods from a French colony to America, and there only given bond for the payment of the duties instead of actually paying them, and then conveys the goods to France, this is decisively illegal, and subjects the cargo to capture and condemnation; a doctrine which it has been insisted is contrary to legal principles. Upon the whole it should seem that the genuineness of these adventures is a matter to be judged of, not by any definite and precise criterion, but by the particular circumstances of each particular case.

The penalty in these cases of colonial trade, as well as in the other cases of illegal commerce carried on by neutrals, is confiscation. It was for some time the custom that the ship should be restored, and the cargo alone confiscated; but, in later times, the strictness of the original principle has been revived, and ship and cargo are both condemned. (*The George Thomas*, 3 Rob. 233; *The Volant*, 4 Rob. App.; 1 Acton, 171.)

Colonial cargo, being intended for the port of the neutral owner of the cargo, is entitled to the favourable construction of that order in council (25th Jan. 1798) which permits the trade of neutral vessels from the colony of the enemy to their own ports; "the right to engage in such a trade is not vitiated on the part of neutral merchants by the circumstance of the cargo being put on board a neutral bottom of another country, and coming to the port of the claimant of the cargo." (Lord Stowell, *The Rosalie and Betty*, 2 Rob. 343.)

Neutrals are allowed by this country to purchase ships in the enemy's country—a liberty which France

has always denied. (See Ordonnances, 1774, 1788, 1793, 1797.) But this can only be allowed to persons conducting themselves in a fair neutral manner, and not accessary to the purposes of the enemy; and in case of disputes arising out of such transactions, the documentary evidence on the part of the neutral must be complete and clear. It is only under special circumstances that a bill of sale will be deemed sufficient proof, while the absence of a bill of sale alone founds a demand for further proof.

The purchase of an enemy's vessel in time of war is liable to great suspicion; and the suspicion is increased when the asserted neutral purchaser appears to be permanently residing in the enemy's country at the time of sale. In condemning *The Bernon*, a ship asserted to have been purchased by an American in France during the war, and taken by the British, on a voyage ostensibly from Bordeaux to Hamburg, but in reality from Bordeaux to Brest, Lord Stowell said (1 Rob. 104): "Whenever it appears that the purchaser was in France, he must explain the circumstances of his residing there: the presumption arising from his residence is, that he is there *animo manendi*, and it lies on him to explain it. . . . With respect to the sale, the evidence produced consists only of a formal bill of sale, in which a Mr. Chanon, of Bordeaux, is the vendor, and of a note given by the master to pay part on her return, and of a receipt. . . . The claimant might have shown his funds. It is not my business to say what precise proof a man is to bring to verify a purchase. I do not know that the enemy vendor's attestation might not have been received—*valeat quantum valere potest*, or there might have been some negotiation shown."

By the 12 & 13 Vict. c. 29, the exclusive privilege of British ships is limited to the coasting trade of the United Kingdom, the trade with the Isle of Man and the Channel Islands, and the coasting trade of the British colonies. In February, 1854, a measure was introduced by the government to remove these remaining restrictions, but it has not yet become law.

Besides the coasting and colonial trades, there are some other commercial transactions, of a nature so liable to abuse, that belligerents have felt themselves justified in setting aside the claims which neutrals have preferred respecting them. In the case of *The Marianna* (1 Rob. 24), a hostile ship, which had been bought of a neutral, this neutral put in a claim against the captors, suggesting that the purchase-money had not been paid to him, and that he had therefore retained a lien upon the property for the payment of that money. But the court said: "Such an interest cannot be deemed sufficient to support a claim of property in a court of prize. Captors are supposed to lay their hands on the gross tangible property on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by liens, which could not in any manner come to their knowledge. It would be equally impossible for the court, which has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different

countries. To decide judicially on such claims, would require of the court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all diversities in which that law exists. From necessity, therefore, the court would be obliged to shut the door against such discussions, and to decide on the simple title of property with scarcely any exceptions.

Of the same class is the case of *The Josephine* (4 Rob. 25). Silver had been shipped by a hostile merchant to his agent in Hamburg, for the purpose, as it was asserted, of satisfying a debt to an American neutral. The cargo was captured; and the American, for whose payment it was thus stated to have been destined, put in a claim in the British Court of Admiralty. The claim was disallowed: "For," said the court, "even if the asserted intention, on the enemy's part, of applying the silver to the payment of the neutral were ever so sincere, it always remained revokable. The hostile merchant retained the power of converting it to any purpose of his own, and the neutral claimant had no document, whatever, giving him the control over it. Under these circumstances, the hostile merchant must be taken to be the legal proprietor; and, as his property, this silver must be condemned." (See also *The Tobago*, 5 Rob. 218.)

The belligerent, when he thinks fit, has, of course, a power to remit the strictness of any of his own rights, and such remissions are not unfrequently made by orders in council, and royal instructions to the commanders of vessels, enjoining them to spare certain branches of trade in particular places, or for a particular time. Whenever these relaxations are afforded

by the government, the Court of Admiralty shows itself uniformly liberal in their construction. In the case of *The Nostra Signora de Piedade* (6 Rob. 41), instructions had been issued by the king in council, directing the commanders of ships not to molest neutral vessels laden with corn, and going to Spain, to whomsoever that corn might belong. The ship in question was not laden solely with corn, having on board, besides grain, a few dozen of oars and other insignificant articles; nor was she going to Spain, in the common acceptation of those words, but was captured in a voyage from one Spanish port to another. Lord Stowell said: "The corn constitutes the cargo; and, although there were on board some other small articles, they are not material, I think, to affect the privilege of the principal cargo, being corn, going under the humane permission of his majesty, to an enemy afflicted with famine and pestilence. At the same time it is objected, that this cargo does not come under the literal terms of the instructions, which are described to be for the importation of corn, &c. But it would, in my opinion, be no more than the fair interpretation of the humane intention of these instructions, to consider them as extending as well to the distribution of corn between the provinces of Spain, as to an importation directly from any other country. Indeed, the indulgence would be in a great measure fruitless without this construction; if cargoes on board neutral ships are entitled to protection in coming from the north of Europe to the northern ports of Spain, they are to be protected also by the same spirit of the same instructions, in being distributed afterwards between the provinces of that kingdom. I am, therefore, disposed to hold this

cargo entitled to protection, unless the privilege shall have been forfeited by any fraudulent or improper conduct; since every grant of this kind must be fairly and honourably acted upon, and if fraud is interposed, and the parties resort to subterfuges of ill faith for their protection, they may justly be considered to have forfeited all benefit from the special indulgence which has been granted to them."

A neutral, of his absolute right, is not to be placed in a worse situation by the war, than that in which he would have remained if peace had continued uninterrupted. To this rule of absolute right the urgent necessities of war form the only exception.

"By virtue of these urgent necessities of war," says Beawes, in his *Lex Mercatoria*, "vessels are frequently detained to serve a prince in an expedition; and, for this, have often their lading taken out, if a sufficient number of empty ones are not procurable to supply the state's necessity, and this without any regard to the colours they bear, or whose subjects they are; so that it frequently happens, that many of the European nations may be forcibly united in the same service, at a juncture when most of their sovereigns are at peace and in amity with the nation which they are obliged to serve. Some have doubted of the legality of the thing, but it is certainly conformable to the law both of nations and nature, for a prince in distress to make use of whatever vessels he finds in his ports, that are fit for his purpose and may contribute to the successes of his enterprise; but under this condition, that he makes them a reasonable recompense for their trouble, and does not expose either the ships or the men to any loss or damage." (See also Molloy, B. 1, c. 6, s. 2.)

Freighting a ship to the enemy is not necessarily lending it. Sweden and England are prohibited under the treaty of Oct. 21, 1661, Art. 11, from selling or lending their ships for the use and advantage of the enemies of the other; but Lord Stowell refused to condemn *The Ringende Jacob* (1 Rob. 89), a Swedish vessel, freighted from Riga to Amsterdam with various articles, some of them contraband, on the ground, that the freighting did come within the lending set forth in the treaty. "To let a ship on freight go to the port of the enemy cannot be termed lending; but in a very loose sense; and I apprehend the true meaning to have been, that they should not give up the use and management of their ships directly to the enemy, or put them under his absolute power and direction."

A neutral may not carry on with either belligerent a commerce in contravention of particular treaties, concluded with such belligerent. In this case, the belligerent whose compact is thus violated has a right to call the neutral to account for his misconduct. (Marshall, p. 1, c. 8, s. 15, p. 319.) The rule as to the extent of neutral jurisdiction has been matter of considerable discussion; but it appears to be now settled, that the distance from the shores and coasts of the neutral, within which he may reasonably claim a right to prohibit the exercise of hostilities, is that comprehended within the range of cannon shot.

The 25th article of the treaty of 1794, between Great Britain and the United States, stipulated that "Neither of the said parties shall permit the ships or goods, belonging to the citizens or subjects of the other, to be taken within cannon shot of the coast, nor in any of the bays, ports or rivers of their territories, by ships

of war, or others having commissions from any prince, republic or state whatever." But Bynkershoeck makes one exception to the general inviolability of neutral territory, and supposes that if the enemy be attacked on hostile ground, as in the open sea, and flee within the jurisdiction of a neutral state, the victor may pursue him *dum fervet opus*, and seize his prize within the neutral state. He rests his opinion entirely on the authority and practice of the Dutch, and admits that he had never seen the distinction taken by the publicists, or in the practice of nations. It appears, however, that Casaregis, and several other foreign jurists mentioned by Azuni, held a similar doctrine. But D'Abreu, Valin, Emerigon, Vattel, Azuni, and others, maintain the same doctrine, that when the flying enemy has entered neutral territory, he is placed immediately under the protection of the neutral power. The same broad principle that would tolerate a forcible entrance upon neutral ground or waters, in pursuit of the foe, would lead the pursuer into the heart of a commercial port. There is no exception to the rule, that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful. In the correspondence which took place between the American Secretary of State (Mr. Webster) and the British minister (the late Lord Ashburton), relative to the case of the American steam-boat *Caroline*, seized on the Canadian border, the former stated, and the rule appears to have been admitted by Lord Ashburton, that to justify a hostile entrance upon neutral territory, there must exist a necessity of self-defence, overwhelming, leaving no choice of means, and no moment for deliberation." (1 Kent, 125.)

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CONTRABAND.

What commerce shall be deemed contraband is a question which has given rise to infinite discussion between the forces of belligerent states, and the merchants of neutral nations. "The king," said Lord Erskine, (Speech on the Orders in Council, 8th March, 1808,) "having, by his prerogative, the power to promulgate who are his enemies, is bound to watch over the safety of the state; he may, therefore, make new declarations of contraband, when articles come into use as implements of war, which before were innocent; this is not the exercise of discretion over contraband; the law of nations prohibits contraband, and it is the *usus bellici*, which, shifting from time to time, make the law shift with them."

In the time of Grotius, some persons contended for the rigour of war, and some for the freedom of commerce. As neutral vessels are willing to seize the opportunity which war presents of becoming carriers for the belligerent powers, it is natural that they should desire to diminish the list of contraband as much as possible. Grotius (Book 3, c. 1, s. 5) distinguishes between, first, things which are useful only so far as arms and ammunition; secondly, things which serve merely for pleasure, and, thirdly, things which are of a mixed nature, and useful both in war and in peace. He agrees with other jurists in prohibiting neutrals from carrying articles of the first kind to the enemy, and in permitting articles of the second class to be carried. As to articles of the third class, those of indiscriminate use in peace and war, such as money, provisions, ships, and naval stores, he lays it down

that they are sometimes lawful articles of neutral commerce and sometimes not, the question depending entirely upon the circumstances existing at the time. They would be contraband, for example, if carried to a besieged town, camp, or port, as in a naval war ships and materials for ships become contraband; and by Rutherforth (Ins. 1, c. 9) horses and saddles are included in the general category of contraband. Vattel (Book 3, c. 7, s. 112) says in general terms, "That commodities particularly used in war are contraband, such as arms, military and naval stores, timber, horses, and even provisions under circumstances, when there are hopes of reducing the enemy by famine." Bynkershoeck (Lib. 1, c. 9, 10) rejects from the list of contraband those articles which are of indiscriminate use in peace and war, regarding the limitation assigned by Grotius to the right of intercepting them—to the case of necessity, and the obligation of restitution or indemnification—as inadequate to justify the exercise of the right. He insists that if all the materials, not intrinsically contraband, of which something may be constructed that is fit for war purposes, the catalogue of contraband will be endless, there being scarcely any article out of which something that may be used in war may not be formed, and that the prohibition of such an infinite variety of articles would constitute almost a total prohibition of commerce. He admits, however, that materials for building ships may fairly come within prohibition, "if the enemy is in great need of them, and cannot well carry on the war without them;" and upon this ground he justifies the edict of the States General of 1657 against the Portuguese, and that of 1652, against the English, as exceptions

to his general rule. The marine ordinance of Louis the Fourteenth, Des Prises, article 11, included horses and their equipage, transported for military service, within the list of contraband, because they were necessary to war equipments; this is doubtless the general rule. The treaty of navigation and commerce of Utrecht, confirmed by the treaty of Aix-la-Chapelle, in 1748, the treaty of Paris, in 1763, the treaty of Versailles, 1783, and the commercial treaty between France and Great Britain of 1786, limited contraband strictly to munitions of war, expressly excluding naval stores, provisions and all other goods not worked up into the form of any instrument or furniture for warlike use. The subject of the contraband character of naval stores afforded matter for infinite altercation between Great Britain and the Baltic powers, throughout the whole of the 18th century. Various relaxations in favour of extreme belligerent pretensions on this subject had been conceded in favour of commerce in articles the peculiar growth and production of these states, either by permitting them to be freely carried to the enemy's ports, or by mitigating the original penalty of confiscation, on their seizure, to the milder right of preventing the goods being carried to the enemy, and applying them to the use of the belligerent, on making a pecuniary compensation to the neutral owner. This controversy was at last terminated by the convention between Great Britain and Russia, concluded in 1801, to which Denmark and Sweden subsequently acceded. By the 3rd article of this treaty, which is literally copied from the treaties of armed neutrality of 1780 and 1800, the list of contraband is confined to munitions of war, excluding naval stores, "without pre-

judice to the particular stipulations of one or the other crown with other powers, by which objects of similar kind should be reserved, provided, or permitted."

In the war between England and France, which commenced in 1793, the United States professed to be governed by the modern usage of nations on this point. (President's Proclamation, April 22, 1793.)

In the treaty concluded between Great Britain and the United States, on the 19th of November, 1794, it was stipulated (article 18) that under the denomination of contraband should be comprised all arms and implements serving for the purposes of war, "and also timber for ship building, tar or rosin, copper in sheets, sails, hemp, and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted."

Brimstone is an article which, under circumstances connecting it with a warlike purpose, is contraband. (*The Ship Carpenter*, 2 Acton, 11.)

The carrying of all merchandize on board of a packet-ship is strictly prohibited by 13 & 14 Car. 2, c. 11, s. 22, except under special allowance there described. The amount of the articles is immaterial, except in a very minute degree, which the revenue laws themselves have specified; the quality also is altogether immaterial; neither does it make any difference whether the owners are on board or not, or whether the lading is called a cargo or private adventure.

The statute enacts, "that no ship, vessel or boat appointed and employed ordinarily for the carriage of letters and packets, shall, unless it be in such cases as shall be allowed by the said person or persons

which are or shall be appointed to manage Her Majesty's Customs, or officers aforesaid, import or export any goods or merchandize into, or out of, the ports beyond the seas, upon the penalty of the forfeiture of £100, to be paid by the master of the said vessel or boat, with the loss of his place; and all goods and merchandize that shall be found on board any such ship, vessel, or boat, shall be forfeited and lost."

The Walsingham (2 Rob. 77) was the case of a British packet, retaken from the enemy in which a claim was given for the cargo as the property of British and Portuguese, and resisted on the part of the captors on the ground of the illegality of such a trade under the statute. In rejecting the claim Lord Stowell observed: "In the next place, what sort of allowance would be held sufficient? It has been argued that a tacit permission would be sufficient, that it would be enough if a practice had grown up by connivance; but I cannot accede to that argument, nor can I consider that to be the permission which the statute recognizes; it must be a full, distinct allowance, and expressed in such a manner as to be capable of proof. If it were proved to have been practised in twenty instances, it would avail nothing; it would only show that the due vigilance had been laid asleep; but it could amount to nothing as a legal dispensation, nor be considered as any legal allowance which the court can receive."

The conveyance of hostile despatches is included in the list of contraband, and deemed a practice of the most noxious character, justly involving the confiscation of the vessel carrying them; and where the

cargo is the property of the proprietor of the ship, of the cargo also. "The question is," says Lord Stowell, "what are the legal consequences attaching on such a criminal act? For that it is criminal and most noxious, is scarcely denied. What might be the consequences of a simple transmission of despatches, I am not called upon by the necessities of the present case to decide, because I have already pronounced this to be a fraudulent case. That the simple carrying of despatches, between the colonies and the mother country of the enemy, is a service highly injurious to the other belligerent, is most obvious. In the present state of the world, in the hostilities of European powers, it is an object of great importance to preserve the connection between the mother country and her colonies; and to interrupt that connection, on the part of the other belligerent, is one of the most energetic operations of war. The importance of keeping up that connection, for the concentration of troops, and for various military purposes, is manifest; and I may add, for the supply of civil assistance also, and support; because the infliction of civil distress, for the purpose of compelling a surrender, forms no inconsiderable part of the operations of war. It is not to be argued, therefore, that the importance of these despatches might relate only to the civil wants of the colony, and that it is necessary to show a military tendency; because the object of compelling a surrender being a measure of war, whatever is conducive to that event must also be considered, in the contemplation of law, as an object of hostility, although not produced by operations strictly military. How is this intercourse with the mother country kept up, in time of peace?

by ships of war, or by packets in the service of the state. If a war intervenes, and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does, in fact, place himself in the service of the enemy-state, and is justly to be considered in that character. Nor let it be supposed, that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of despatches may be conveyed the entire plan of a campaign, that may defeat all the projects of the other belligerent in that quarter of the world. It is true, as it has been said, that one ball might take off a Charles the Twelfth, and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that in the contemplation of human events, it is a sort of evanescent quantity of which no account is taken; and the practice has been accordingly, that it is in considerable quantities only that the offence of contraband is contemplated. The case of despatches is very different; it is impossible to limit a letter to so small a size, as not to be capable of producing the most important consequences in the operations of the enemy. It is a service therefore which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature.

"It has accordingly been so held in decided cases that fully recognize the principle; for on this principle

The Constitution (Lords, 14th July, 1802) was condemned: and how is that case to be distinguished? It is said that that was not a case of despatches simply, but that it was dependent on the modified relaxation of the principle of exclusion from the colonial trade of the enemy in the West Indies, that it was also a case of carrying backwards and forwards, in two separate instances, from the Havana to Truxillo and back again. But can these circumstances make any difference? The exclusion being taken off, that trade stood upon the common footing; and if the carrying of the original despatches is no offence, will the circumstance of being made the vehicle of carrying the answer to those despatches make it so?

"The case of *The Sally*, Griffiths (Lords, 12th Dec., 1795), has been mentioned as one in which this principle was not applied, at the commencement of the late war; but there the despatches were not referable to the operations of war, or even to the existence of war. The vessel had sailed before the knowledge of hostilities, and the despatches were altogether of a commercial nature, from the French minister in America, relating to a contract for flour, which had been made (wholly unconnected with the war, and prior to the expectation of such an event) for the purpose of supplying France and the French colonies in the West Indies, in a year of great scarcity.

"*The Hope* (Lords, 23rd April, 1803) is another case which has been mentioned as an instance in which the Superior Court passed over an imputation of this kind, without suffering it to obstruct the sentence of restitution, which was finally decreed. But in that case it was admitted, that no such paper was on board.

There was merely a receipt, appearing to have been given by the captain, for a packet taken by him from the Governor of Batavia, to be transmitted to the Dutch minister in America, and to be forwarded ultimately to Amsterdam. In fact, the question was not raised. It was argued, that the packet might not have been on board; and that it might, notwithstanding the receipt, have been sent by some other American ship, of which there were several lying at Batavia at the same time. The case came before the Court of Appeal from the Vice-Admiralty Court at the Cape of Good Hope, and the Superior Court acted on the presumption that the court below had made the necessary inquiry, and had been satisfied on that point. The appeal proceeded on other grounds, and therefore the question did not fairly present itself; and the Court of Appeal, adopting the conclusion of the court below upon the point, did not think it necessary to direct further inquiry to be instituted upon this fact when the cause came on to be heard, and when the opportunity of investigating it was gone by. The effect of that decision, therefore, has no application to the present question.

"In *The Trende Sostre* (5th August, 1807), in which the same fact came incidentally before this court, the question of law was avoided, as was also that of contraband, by the circumstance, that, before the seizure, the Cape of Good Hope, to which port the vessel was going, had ceased to be a colony of the enemy, and had become an English settlement.

"In *The Lisette* (5th May, 1807), which had carried a Dutch packet in the Danish mail-bag, the vessel was captured on the return voyage, and then

also a paper of this description was produced by a woman who had so discredited herself, by the manner in which she appeared to have acted, being the person who had taken the papers on board by fraud against the master (who had conducted himself *optimâ fide*, and had exerted his utmost influence and authority to prevent any papers from being put on board), that the court repudiated her evidence altogether, and refused to act upon it in a case of that description.

"In all these cases the principle was uniformly asserted, although the circumstances under which the fact appeared did not lead the court to consider it with that particularity which the nature of the present case requires. Unless, therefore, it can be said that there must be a plurality of offences to constitute the delinquency, it has already been laid down by the Superior Court in *The Constitution*, that the fraudulent carrying the despatches of the enemy is a criminal act, which will lead to condemnation. Under the authority of that decision, then, I am warranted to hold that it is an act which will affect the vehicle, without any fear of incurring the imputation which is sometimes strangely cast upon this court, that it is guilty of interpolations in the laws of nations. If the court took upon itself to assume principles in themselves novel, it might justly incur such an imputation; but to apply established principles to new cases cannot surely be so considered. All law is resolvable into general principles. The cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized, by just corollaries, may be infinite; but so long as the continuity of the original and established principles is

preserved pure and unbroken, the practice is not new, nor is it justly chargeable with being an innovation on the ancient law, when, in fact, the court does nothing more than apply old principles to new circumstances. If, therefore, the decision which the court has to pronounce in this case stood on principle alone, I should feel no scruple in resting it on the just and fair application of the ancient law. But the fact is, that I have the direct authority of the Superior Court for pronouncing that the carrying the despatches of the enemy brings on the confiscation of the vehicle so employed.

"It is said, that this is more than is done even in cases of contraband; and it is true, with respect to the very lenient practice of this country, which in this matter recedes very much from the correct principle of the law of nations, which authorizes the penalty of confiscation. This is rightly stated by Bynkershoeck to depend on this fact, whether the contraband is taken on board with the actual or presumed knowledge of the owner;—I say presumed knowledge, because the knowledge of the master is, in law, knowledge of the owner; '*si sciverit, ipse est in dolo, et navis publicabitur*' (Bynk., c. 12, p. 95). This country, which, however much its practice may be misrepresented by foreign writers, and sometimes by our own, has always administered the law of nations with lenity, adopts a more indulgent rule, inflicting on the ship only a forfeiture of freight in ordinary cases of contraband. But the offence of carrying despatches is, it has been observed, greater. To talk of the confiscation of the noxious article, the despatches, which constitutes the penalty in contraband, would be ridiculous. There would be

no freight dependent on it, and therefore the same precise penalty cannot, in the nature of things, be applied. It becomes absolutely necessary, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle. Then comes the other question, whether the penalty is not also to be extended further to the cargo, being the property of the same proprietors—not merely *ob continentiam delicti*, but likewise because the representatives of the owners of the cargo are directly involved in the knowledge and conduct of this guilty transaction? On the circumstances of the present case I have to observe, that the offence is as much the act of those who are the constituted agents of the cargo, as of the master who is the agent of the ship. The general rule of law is, that where a party has been guilty of an interposition in the war, and is taken *in delicto*, he is not entitled to the aid of the court, to obtain the restitution of any part of his property involved in the same transaction. It is said, that the term 'interposition in the war' is a very general term, and not to be loosely applied. I am of opinion, that this is an aggravated case of active interposition in the service of the enemy, concerted and continued in fraud, and marked with every species of malignant conduct. In such a case I feel myself bound, not only by the general rule, *ob continentiam delicti*, but by the direct participation of guilt in the agents of the cargo. Their own immediate conduct not only excludes all favourable distinction, but makes them pre-eminently the object of just punishment. (*The Atalanta*, 6 Rob. 440.)

The court observed afterwards:—"I will mention,

though it is a circumstance of no great consequence, that I have seen the despatches in this case, and that they are of a noxious nature, stating the strength of the different regiments, &c., and other particulars entirely military." Other cases that have occurred on the question of despatches are—*The Constantia*, Holbec (15th March, 1808), a Danish ship taken on a voyage from the Isle of France to Copenhagen, having on board a packet which was to be delivered to the French ambassador at Copenhagen, to be by him forwarded to the departments of government in France. Hostilities with Denmark having intervened, the claims of the Danish proprietor could not be given. The case was argued only with respect to the interest in the prize, between the crown and the captors, and therefore no special explanations were offered on the part of the master. The court observed, upon the evidence, that the master appeared to have taken charge of this packet knowingly; and though there did not appear to have been any fraudulent concealment, he had been in the custody of a British frigate fifteen days without making any disclosure of the fact that he was part-owner of the vessel and of the cargo, and had been entrusted with the management of the expedition, as agent, by his co-partner; that the case, therefore, must follow the course of *The Atalanta*, independent of the breaking out of the Danish hostilities, on which only the claim of the crown was founded, and that the captors were entitled to the condemnation of the ship and cargo.

The Susan (1st April, 1808), an American vessel, captured on a voyage from Bordeaux to New York, having on board a packet, addressed to the Prefect of

the Isle of France, of which it did not appear that it contained more than a letter, providing for the payment of the officers' salary. The master had made an affidavit, averring his ignorance of the contents, and stating that the packet was delivered to him by a private merchant, as containing old newspapers and some shawls, to be delivered to a merchant at New York. The insignificance of such a communication, and its want of connection with the political objects of the war, were insisted upon. But the court overruled that distinction, on grounds similar to those above stated; and on the plea of ignorance observed, that without saying what might be the effect of an extreme case of imposition practised on a neutral master, notwithstanding the utmost exertions of caution and good faith on his part, it must be taken to be the general rule, that a master is not at liberty to aver his ignorance, but that if he is made the victim of imposition, practised on him by his private agent, or by the government of the enemy, he must seek for his redress against them. That in this instance the master did not appear, even from his own account, to have used any caution to inform himself of the nature of the papers; that with respect to the disclosure, although the papers were not so kept as to implicate him in the charge of a fraudulent concealment, they were not produced to the captors as they ought to have been. It was necessary to be known that it would be considered as a proof of fraud, if papers of this description being on board were not produced voluntarily in the first instance. In this case, the ship was condemned, but the cargo was restored, and even that part belonging to the owner of the ship, as it did not appear that

the master had been appointed agent for the cargo. But (2nd June, 1808) on prayer that the master might be allowed his private adventure, the court observed, that this was a description of cases in which the usual indulgence of the court, in that respect, would be misapplied. That it was an offence originating chiefly in the misconduct or culpable negligence of the master, and that whilst he was acting, thus culpably and wantonly with respect to the property of his owner, it could not be expected that he himself should escape with impunity, as far as his own adventure in that transaction was concerned.

"That the carrying despatches between the mother country and her colonies is criminal," said Lord Stowell, in *The Caroline* (6 Rob. 464), "can hardly be doubted; and I have never heard of a claim of privilege of this kind being asserted on the part of any nation, or by any individual. On the contrary, the artifices of clandestinity and concealment, with which such acts have always been accompanied, strongly betray the opinion which the individuals themselves entertain of the right. It has been asked, what are despatches? to which, I think, this answer may safely be returned: that they are all official communications of official persons, on the public affairs of the government. The comparative importance of the particular papers is immaterial, since the court will not construct a scale of relative importance, which, in fact, it has not the means of doing, with any degree of accuracy, or with satisfaction to itself; it is sufficient that they relate to the public business of the enemy, be it great or small. It is the right of the belligerent to intercept and cut off all communication between the enemy and

his settlements, and, to the utmost of his powers, to harass and disturb this connection, which it is one of the declared objects of the ambition of the enemy to preserve. It is not to be said, therefore, that this or that letter is of small moment: the true criterion will be, is it on the public business of the state, and passing between public persons for the public service? This is the question. If individuals take papers, coming from official persons, and addressed to persons in authority, and they turn out to be mere private letters, as may sometimes happen in the various relations of life, it will be well for them, and they will have the benefit of so fortunate an event. But if the papers so taken relate to public concerns, be they great or small, civil or military, the court will not split hairs, and consider their relative importance. For on what grounds can it proceed to make such an estimate with any accuracy? What appears small in words, or what may, perhaps, be artfully disguised, may relate to objects of infinite importance, known only to the enemy, and of which the court has no means of judging. The court, therefore, will not take upon itself the burden of forming such a scale, but will look only to the fact, whether the case falls within the general description or not."

The conveyance, however, of the despatches of an ambassador situate in a neutral country are an exception to the rule. In *The Caroline*, just cited, the learned judge proceeded to observe: "The circumstances of the present case, however, do not bring it within the range of these considerations, because it is not a case of despatches coming from any part of the enemy's territory, whose commerce and communications of every kind the

other belligerent has a right to interrupt. They are despatches from persons who are, in a peculiar manner, the favourite objects of the protection of the law of nations,—ambassadors, resident in a neutral country, for the purpose of preserving the relations of amity between that state and their own government. On these grounds a very material distinction arises with respect to the right of furnishing the conveyance. The former cases were cases of neutral ships carrying the enemy's despatches from his colonies to the mother country. In all such cases you have a right to conclude, that the effect of those despatches is hostile to yourself, because they must relate to the security of the enemy's possessions, and to the maintenance of a communication between them; you have a right to destroy these possessions and that communication; and it is a legal act of hostility so to do. But the neutral country has a right to preserve its relations with the enemy; and you are not at liberty to conclude, that any communication between them can partake, in any degree, of the nature of hostility against you. The enemy may have his hostile projects to be attempted with the neutral state, but your reliance is on the integrity of that neutral state, that it will not favour or participate in such designs; but, as far as its own councils and actions are concerned, will oppose them. And if there should be private reason to suppose, that this confidence in the good faith of the neutral state has a doubtful foundation, that is matter for the caution of the government to be counteracted by just measures of preventive policy; but is no ground on which this court can pronounce, that the neutral carrier has violated his duty by bearing despatches, which, as far as he can know,

may be presumed to be of an innocent nature, and in the maintenance of a pacific connection. One material ground, therefore, is wanting, on which the judgment of the court proceeded in the former cases. Another distinction arises from the character of the person who is employed in the correspondence. He is not an executive officer of the government, acting simply in the conduct of its own affairs, within its own territories, but an ambassador resident in a neutral state, for the purpose of supporting an amicable relation with it. I have before said, that persons discharging the functions of ambassadors, are, in a peculiar manner, objects of the protection and favour of the law of nations. The limits that are assigned to the operations of war against them, by Vattel (B. 4, c. 11), and other writers upon those subjects, are, that you may exercise your right of war against them, whenever the character of hostility exists; you may stop the ambassador of your enemy on his passage; but when he has arrived, and has taken upon himself the functions of his office, and has been admitted in his representative character, he becomes a sort of middle man, entitled to peculiar privileges, as set apart for the protection of the relations of amity and peace, in maintaining which all nations are, in some degree, interested. It has been argued, that he retains his national character unmixed, and that even his residence is considered as a residence in his own country; but this is a fiction of law, invented for his further protection only, and, as such a fiction, it is not to be extended beyond the reasoning on which it depends. It was intended as a privilege; and I am not aware of any instance in which it has been urged to his disadvantage. Could it be said that he would, on that principle, be

subject to any of the rights of war in a neutral territory? Certainly not. He is there for the purpose of carrying on the communications of peace and amity, for the interest of his own country primarily; but, at the same time, for the furtherance and protection of the interests which the neutral country also has in the continuance of those relations.

"It is to be considered, also, with regard to this question, what may be due to the convenience of the neutral state; for its interests may require that the intercourse of correspondence with the enemy's country should not be altogether interdicted. It might be thought to amount almost to a declaration, that an ambassador from the enemy shall not reside in the neutral state, if he is declared to be debarred from the only means of communicating with his own. For, to what useful purpose can he reside there, without the opportunities of such a communication? It is too much to say, that all the business of the two states shall be transacted by the minister of the neutral state, resident in the enemy's country. The practice of nations has allowed to neutral states the privilege of receiving ministers from the belligerent states, and the use and convenience of an immediate negotiation with them. It is said, and truly said, that this exception may be liable to great abuses, and so, perhaps, will any rule that can be laid down on this subject:—

'Mille adde catenas;
Effugiet tamen hæc.'

Opportunities of conveying intelligence may always exist in some form or other. It may happen that much mischief may arise by the communication of news, in the private letters of intriguing private men, or,

of intriguing women; but if they are not stamped with the character of public communications, this court cannot pursue the consequence to the penalty of those persons who may be made the vehicles of conveying such a correspondence. It has been argued truly, that whatever the necessities of the negotiation may be, a private merchant is under no obligation to be the carrier of the enemy's despatches to his own government. Certainly he is not. And one inconvenience to which he may be held fairly subject, is that of having his vessel brought in for examination, and of the necessary detention and expense. He gives the captors an undeniable right to intercept and examine the nature and contents of the papers which he is carrying; for they may be papers of an injurious tendency, although not such, on any *à priori* presumption, as to subject the party who carries them to the penalty of confiscation, and by giving the captors the right of that inquiry, he must submit to all the inconveniences that may attend it." The ship and cargo were restored on payment of the captor's expenses.

The carrying of despatches by a neutral from a hostile port to a consul of the enemy resident in a neutral country, is not a ground of condemnation. (*The Maddison*, Edw. 224.) When despatches from an agent of the enemy are carried by a neutral ship, going from a neutral port to the port of the enemy, the plea of ignorance on the part of the neutral master will be admitted; but not so where they are carried from one port of the enemy to another, in which case the master is bound to greater vigilance as to what papers he carries. (*The Rapid*, Edw. 228.) A neutral merchant

vessel asserted to be carrying despatches for the government of its own country cannot set up that employment as a ground of protection for a voyage otherwise illegal; and even if such a claim were given on the part of the government itself, it would be a serious question how far a neutral state possesses the right of imparting such protection. (*The Drummond*, 1 Dod. 103.)

Hemp, the produce of Russia, exported by a Danish merchant, would be confiscable, even under the relaxation which allows neutrals to export that article only where it is of the growth of their own country; but to a Dane, hemp is expressly enumerated among the articles of contraband in the Danish treaty (additional article, July 4, 1780); and to say that a Dane might traffic in foreign hemp, whilst he is forbidden to export his own, would be to put a construction on that treaty perfectly nugatory. (Lord Stowell, in *The Ringende Jacob*, 1 Rob. 90.) In *The Apollo*, however (4 Rob. 158), in relaxation of the strict principle, it was held, that hemp, being the produce and property of the exporting country, and carried even in a vessel not belonging to that country, is not liable to confiscation. *The Evart Evarts* (4 Rob. 354) was a case of a cargo of hemp going from Lubeck to Amsterdam, and claimed for merchants of Lubeck. In the bills of lading it was described as *pass hemp:* on that point a doubt arose as to the particular character of *pass hemp*, a term not remembered to have occurred before. Lord Stowell said:—"It would be too hard to restrain these terms to the produce of their own particular territory; but as hemp is now held to be contraband in its general character, it lies on the claimants to show that there

is anything in the particular circumstances of the case to vary that character, and to entitle it to any exemption. On this point, therefore, I shall hold that it was incumbent on the claimants to show that the hemp was the growth of those neighbouring districts, whose produce they are usually employed in exporting in the ordinary course of their trade. As this has not been done, I shall pronounce this cargo to be contraband, subject to the inquiry which has been directed to be made, as to its quality, from the official persons in his Majesty's dock-yard." In a subsequent case, *The Jonge Hermanus* (ib. 95), where the value was represented as too small to bear the expense of the captors, the court said:—"Torse is so like hemp that, if it is permitted to be carried without examination, the enemy would be very well supplied with hemp. It is necessary that such cargoes should be brought in for examination." In *The Gute Gesellschaft*, (ib. 94), hemp of an inferior quality—Cordilla hemp—reported by the officer of the King's yard, at Woolwich, not fit for naval purposes, was held not contraband, and the cargo was ordered to be restored, on payment of the captors' expenses.

Copper in sheets, fit for the sheathing of vessels, is contraband, under treaty. In *The Charlotte Fox* (5 Rob. 275), the question was respecting a quantity of copper in sheets, taken on a voyage from Stockholm to Amsterdam, and claimed as the property of merchants in Sweden. It was contended that this copper was to be deemed contraband, more particularly under the terms of the Swedish treaty (25th July, 1803, article 1), by which "the supply of all manufactured

articles immediately serving for the equipment of ships of war was prohibited. Lord Stowell condemned that part of the cargo which was reported fit for the sheathing of vessels. "In ordinary cases the rule is that one article of contraband quality will affect all the parts of the cargo on board belonging to the same proprietor; but this is a new case, respecting the construction of a treaty, on which a difference of opinion may have been entertained. I shall, therefore, not apply the old rule in this case, but direct the undisputed articles to be restored."

Iron is an article than which none in nature, perhaps, comes more exactly under the description of an article of promiscuous use; it is a commodity subservient to the most infinite variety of human uses. It is an article which, going to a port of naval equipment, may very probably be applied as a naval store; but it may be too much to decide merely on this inference, that it is an article absolutely hostile; nor can it be said that because *unwrought iron* is excepted in some treaties, as not contraband, therefore, where no exception is expressed, it is to be considered as contraband.

Pitch and tar are decidedly contraband in their nature; yet, when the produce of the claimant's own country, they have been exempted from the penalty attaching upon contraband in general, as it has been deemed a harsh exercise of a belligerent right, to prohibit a material branch of a neutral's natural trade. "Pitch and tar," says Lord Stowell, in *The Sarah Christina* (1 Rob. 237), "are now become generally contraband in a maritime war; they have been condemned as such by the highest authority in this

country. In the practice of this court there is a relaxation, which allows the carrying of these articles, being the produce of the claimant's country; as it has been deemed a harsh exercise of a belligerent right to prohibit the carriage of these articles, which constitute so considerable a part of its native produce and ordinary commerce. But in the same practice, this relaxation is understood with a condition, that it may be brought in, not for confiscation, but for pre-emption." In *The Twee Juffrowen* (4 Rob. 158), tar and pitch, not the produce of the exporting country, were condemned as contraband. "There can be no doubt," said Lord Stowell (*The Jonge Tobias*, 1 Rob. 329), "in this case, but that the tar is liable to condemnation, as unclaimed, and also as contraband, being taken going from a port of the country of which it could not be the produce." "In the war of 1700," writes Valin (*Comment. sur l'Ordonnance, Des Prises*, l. 3, tit. 9, art. 2), "pitch and tar were comprehended in the list of contraband, because the enemy treated them as such, except when found on board Swedish ships, these articles being of the growth and produce of their country. In the treaty of commerce concluded with the King of Denmark by France, the 23rd of August, 1742, pitch and tar were also declared contraband, together with rosin, sail-cloth, hemp and cordage, masts and ship timber. Thus, as to this matter, there is no fault to be found with the conduct of the English, except where it contravenes particular treaties, for in law these things are now contraband, and have been so since the beginning of the present century, which was not the case formerly, as it appears by ancient treaties, and particularly that of

St. Germain, concluded with England in 1677, the fourth article of which expressly provides, that the trade in all these articles shall remain free, as well as in everything necessary to human nourishment, with the exception of places besieged or blockaded." In the case of *The Maria* (1 Rob. 340), it was held that pitch, tar, as well as hemp, and whatever other materials go to the construction and equipment of vessels of war, are contraband by the modern law of nations; though formerly, when the hostilities of Europe were less naval than at the present day, they were of a disputable nature. Where, in the case of *The Zacheman* (5 Rob. 152), a cargo of tar from Sweden to Rochefort was brought into a British port "for inquiry as to the fact of property, whether it was going on the private account of the neutral merchant, or under a contract with the government, by which those arsenals of the enemy are more usually supplied," and with a view to pre-emption (substituted by the treaty with Sweden for the right of forfeiture), the government having refused to purchase, and some delay having in consequence arisen, Lord Stowell allowed three weeks' demurrage to the owner, to be paid by the government, adding, "I wish the Admiralty may be apprized, that under the treaty which now exists, matters of this kind must not be kept subject to long negociation, since it is not less expedient for the purposes of justice, than for the interests of all parties concerned, that a prompt answer should be returned, as to the disposition of government to avail itself of the right of pre-emption."

Provisions (*munitions de bouche*) constitute a cargo which has presented very great difficulty in the deci-

sion of questions as to contraband. Locennius (*De Jure Maritimo*, lib. 1, c. 4, n. 9), and some other authorities referred to by Valin, consider provisions as generally contraband; but Valin (Com. ii. 264) and Pothier (*De Proprieté*, No. 104) insist that they are not so, either by the law of France or the common law of nations, unless carried to besieged or blockaded places. Vattel, as we have seen, admits that they become so on certain occasions, when there is an expectation of reducing the enemy by famine. The National Convention of France, 9th May, 1793, decreed, that neutral vessels, laden with provisions, destined to an enemy's port, should be arrested and carried into France; and one of the earliest acts of England, in that war (Instructions of 8th June, 1793), was to detain all neutral vessels going to France, and laden with corn, meal, or flour. It was insisted, on the part of England (Mr. Hammond's Letter to Mr. Jefferson, September 12, 1793; and his Letter to Mr. Randolph, April 11, 1794), that, by the law of nations, all provisions were to be considered as contraband, in the case where depriving the enemy of those supplies was one of the means employed to reduce him to reasonable terms of peace; and that the actual situation of France was such as to lead to that mode of distressing her, inasmuch as she had armed almost the whole labouring class of her people for the purpose of commencing and supporting hostilities against all the governments of Europe. This claim on the part of England was promptly and perseveringly resisted by the United States; and they contended that corn, flour and meal, being the produce of the soil and labour of the country, were not contraband of war, unless carried to a place actually invested.

(Mr. Jefferson's Letter to Mr. Pinckney, September, 7th 1793, and Mr. Randolph's Letter to Mr. Hammond, May 1st, 1794.) The treaty of commerce with England, in 1794, in the list of contraband, stated, that whatever materials served directly to the building and equipment of vessels, with the exception of unwrought iron, and fir planks, should be considered contraband and liable to confiscation; but the treaty left the question of provisions open and unsettled, and neither power was understood to have relinquished the construction of the law of nations which it had assumed. The treaty admitted, that provisions were not generally contraband, but might become so according to the existing law of nations, in certain cases, and those cases were not defined.

It was only stipulated, by way of relaxation of the penalty of the law, that whenever provisions were contraband, the captors, or their government, should pay to the owner the full value of the articles, together with the freight, and a reasonable profit. The United States government has repeatedly admitted, that, as far as that treaty enumerated contraband articles, it was declaratory of the law of nations, and that the treaty conceded nothing on the subject of contraband. (Mr. Pickering's Letter to Mr. Monroe, September 12, 1795; his Letter to Mr. Pinckney, January 16, 1797; Instructions from the Secretary of State to the American Minister to France, July 15, 1797; Kent, Commentaries, 1, 141.)

The doctrine of the English Admiralty on the subject of provisions being considered contraband, is thus laid down by Lord Stowell, in *The Jonge Margaretha* (1 Rob. 192). "In 1673, when many unwarrantable rules were laid down by public authority re-

specting contraband, it was expressly asserted by Sir R. Wiseman, the then king's advocate, upon a formal reference made to him, that by the practice of the English Admiralty, corn, wine and oil were liable to be deemed contraband. 'I do agree,' says he, (reprobating the regulations that had been published, and observing that rules are not to be so hardly laid down as to press upon neutrals, 'that corn, wine and oil will be deemed contraband.' These articles of provisions then were at that time confiscable, according to the judgment of a person of great knowledge and experience in the practice of this court. In much later times, many other sorts of provisions have been condemned as contraband. In 1747, in *The Jonge Andreas*, butter, going to Rochelle, was condemned; how it happened that at the same time cheese was more favourably considered, according to the case cited by Dr. Swabey, I do not exactly know; the distinction appears nice; in all probability the cheeses were not of the species intended for ships' use. Salted cod and salmon were condemned in *The Jonge Frederick*, going to Rochelle, in the same year. In 1748, in *The Johannes*, rice and salted herrings were condemned as contraband. These instances show that articles of human food have been so considered, at least where it was probable that they were intended for naval or military use.

"I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it."

The courts of the United States have sanctioned the same rule in the case of *The Commercen* (2 Gall.

269). "Provisions, the growth of the enemy's country, owned by the enemy's subjects, carried by a neutral to the enemy's army or navy operating in another neutral country, are contraband, and cannot earn freight for the vessel." "It makes no difference in such a case that the enemy is carrying on a distinct war in conjunction with his allies, who are friends of the captor's country, and that the provisions are intended for the supply of his troops engaged in that war, and that the ship in which they are transported belongs to subjects of one of these allies." (1 Wheat. 382.)

Cheese, fit for naval use, and going to a port of naval equipment, is contraband. In *The Vrow Margaretha*, a cargo of Dutch cheese was taken on a voyage from Amsterdam to Quimper. On the part of the captors it was contended, that a destination to Quimper must be considered as an actual destination to Brest, under a mask to protect these articles in their course to the naval arsenal of the enemy. Lord Stowell said, "I am not disposed to hold that these articles on this destination are so clearly contraband, though certainly very near it, as to preclude the claimant from giving further proof of the property. (6 Rob. 92.) In *The Zelden Rust*, a cargo of Dutch cheese was taken in an asserted destination from Amsterdam to Corunna. An affidavit was produced, describing the cheese to be fit for naval stores, and such as is usually served on board French and Spanish ships of war. Lord Stowell said: "It certainly has been held by the court, that cheese going to a place of naval equipment, and fit for naval use, is contraband. Corunna is, I believe, a place of naval equipment in some degree; yet, from its vicinity to Ferrol,

it is almost identical with that port. These ports are situated in the same bay; and if the supply is permitted to be imported into the bay, it would be impossible to prevent it from going in immediately, and in the same conveyance to Ferrol. There is, therefore, a material difference between the present case and the case of similar articles going to Quimper. That port, though in the vicinity of Brest, is situated on the opposite side of a headland, so as not to admit of an immediate communication except by land carriage. I think myself warranted to consider this cargo, in the present destination, as contraband, and, as such, subject to condemnation." (6 Rob. 93.)

Ship biscuits will be treated as contraband, under particular circumstances. *The Ranger*, an American ship, with a cargo of biscuits and flour put on board from the public stores at Bordeaux and going to Cadiz, though ostensibly documented for Villa Real in Portugal, was condemned with the cargo. A claim was given for the cargo under the instruction of the 1st of Feb., 1805. Lord Stowell said, "This is a very gross attempt to abuse the instructions which were issued for the supply of provisions to Spain. It must always be remembered that this government might have availed itself of the interior distress of the enemy's country as an instrument of war. It did not, however; but humanely permitted cargos of grain to be carried without molestation for the relief of the necessities of famine under which Spain had for some time laboured. It was natural to expect that a grant made with so much liberality would have been used with the most delicate honour and good faith, both by Spain and her allies. I cannot but consider this attempt as a gross abuse of the instructions which

will justly render the cargo subject to condemnation, and I think I am called upon to stigmatize this transaction as an act of ill faith by condemning the claimant in the expenses of the claim. I also condemn the vessel as employed in carrying a cargo of sea-stores to a place of naval equipment under false papers." (6 Rob. 125.)

Wines are not an article generally contraband *per se*, yet, in conjunction with circumstances which bring them within the category of naval stores, they become so. In *The Edward* (4 Rob. 68), a Prussian ship on a voyage to Brest with a cargo of wines from Bordeaux, ostensibly to Embden, Lord Stowell in condemning the cargo and ship, said—"This is a voyage to Brest, where there was notoriously a large armament lying, very much in want of articles of this kind,—articles of an indispensable nature. If such articles had gone with an avowed destination to such a place, and at such a conjuncture, the rule of pre-emption would have been a rule of excessive and undue indulgence to apply to such a case; but, where the destination is dissembled, confiscation is the clear and necessary consequence. It has been said, that this voyage, being a voyage from one port of the enemy to another, cannot be deemed a voyage of supply to him; but it is to be remembered, that Brest is a port not situated within a wine province of that country, and must have its supplies by importation from other ports; and the rule has been already established, that the transfer of contraband from one port of a country to another, where it is required for the purposes of war, is subject to be treated in the same manner, as an original importation into the country itself. The vessel so employed can hardly be considered in

any other character than that of a French victualler, carrying, to the place of naval equipment, *munitions de bouche;* and this, with a false representation of her voyage, in order to evade the rights of pre-emption or confiscation, whatever they might be, which would attach upon such a cargo, visibly going upon such a destination. Under such a state of facts, the ship is involved in condemnation with her cargo."

Among the circumstances which tend to preserve provisions from being liable to be treated as contraband, one is (says Lord Stowell), "that they are the growth of the country which exports them. Another circumstance to which some indulgence, by the practice of nations, is shown, is when the articles are in their native and unmanufactured state. Thus, iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favourably considered than cordage; and wheat is not considered as so noxious a commodity as any of the final preparations of it for human use. But the most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ships' use; or whether they were going with a highly probable destination to military use? Of the matter of fact on which the destination is applied, the nature and quality of the port to which the articles were going is not an irrational test; if the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ship of war may be constructed in that port. *Contra,* if the great predominant character of a port be that of a port of naval and military equipment, it shall be intended that the articles

were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article, *ancipitis usus*, it is not an injurious rule, which deduces, both ways, final use from the immediate destination, and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed if, at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful." (*The Jonge Margaretha*, 1 Rob. 194.)

Rosin, going to a military port of the enemy, is deemed contraband; but, going to a merchantile port, it is not so decidedly of a warlike nature as to be excluded from the favourable considerations that are applied to other articles, *ancipitis usus*. (*Nostra Senora de Begona*, 5 Rob. 99.) Rosin, on board a Portuguese ship to Nantes, was restored to the owner of the ship. (Dec. 12, 1747.)

Sail cloth is universally contraband, even on a destination to ports of mere mercantile naval equipment. Two hundred and seventy-five bundles of sail cloth, part of the cargo of *The Neptunus* (3 Rob. 108), were condemned on this ground, having been taken on a destination to Amsterdam. The quantity of contraband on board, however, being small, the court allowed freight and expenses.

Ships constructed for war are, under particular circumstances, contraband. *The Richmond* (5 Rob. 325) was the case of an American vessel seized in port by order of the governor of Saint Helena, and proceeded against as prize to the king in his office of

Admiralty, on the ground that she was going under a false destination to the Isle of France, with articles of a contraband nature concealed on board, and with a view of selling the vessel there, as a vessel well adapted for a ship of war, and for the service of privateering. Lord Stowell said, "Here was an avowed intention of going to sell a ship to a belligerent, which, in time of war, is at least a very suspicious act; and, to do a great deal more, to sell a ship which the neutral owner knew to be peculiarly adapted for purposes of war, and with a declared expectation that it would be hostilely employed against this country. It cannot surely, under any point of view, but be considered as a very hostile act to be carrying a supply of a most powerful instrument of mischief, of contraband ready made up, to the enemy for hostile use, and intended for that use by the seller, and with an avowed knowledge that it would be so applied. It is not altogether improper to observe, also, on the manner in which this intention was declared, since the malignant nature of such a purpose was not a little increased by the indecent levity with which the master expressed himself, 'that she would be seen playing round the East India Company's ships in the Bay of Bengal next season.' It is surely no breach of charity to impute the most unfavourable intentions to such conduct; and if transactions are in themselves of a questionable nature, such declarations are quite sufficient to determine their true colour and complexion." In the case of *The Brutus* (5 Rob. App. 1), a ship built at Salisbury, in the state of Massachusetts, pierced for fourteen guns, but with only two mounted, to defend her, as alleged, against French privateers, but exclusively

constructed for warlike purposes, and not in any respect fitted for commerce, and going to the Havana, with instructions to the master that he should sell her, or take goods on freight at his discretion; but that the owners would prefer the sale of her rather than freighting her, as she was not calculated for such employ unless necessitated, was condemned by the Court of Appeal as contraband. In two cases shortly preceding (*The Fanny*, Ingraham, and *The Neptune*, Gibbs), the vessels were of a more ambiguous construction, yet going to the Havana to be sold, with directions that they should be sold there. They had been condemned as contraband in the Vice-Admiralty Court of the Bahamas; but in the hearing before the Court of Appeal, in consideration of the equivocal nature of their character, and the employment in trade in which they had been actually engaged, and of the occasion for selling arising out of the circumstances attending them, the lords reversed the sentence of the court below, and decreed restitution. In *The Raven*, which was also restored, the vessel had been a French privateer, and had been condemned as such at New York; but it appeared that the purchaser had bought her for the purposes of trade, and having used his best endeavours to make her fit for that service, had found her unsuitable, and was on that account intending to sell her again. Sir C. Robinson (5 Rob. App. 1) adds, "It will appear from a comparison of these cases, that though the principle of considering the sale of ships of war to the enemy contraband, is strictly held by the decisions of the Court of Appeal, the application of the principle has been restricted to cases in which no doubt existed as to the

character of the vessels, or the purposes for which they were intended to be sold."

Neutrals cannot be allowed to carry out a larger quantity of ship stores, which are contraband, as cargo, than are necessary for the ship's use, on the suggestion of the speculation of purchasing other ships. In *The Margaretha Magdalena* (2 Rob. 138), Lord Stowell said: "It is an alarming circumstance in this case, that, although the outward cargo appears to have consisted of contraband goods, yet the principal owner appears publicly at Copenhagen, and makes oath, that there were no prohibited goods on board destined to the ports of any party now at war. The master himself describes the cargo that he carried out as naval stores; and, on looking into the invoice, I find that they are there represented as goods to be sold. That being so, I must hold that it was a most noxious exportation, and an act of a very hostile character, to send out articles of this description to the enemy, in direct violation of public treaties, and of the duties which the owners owe to their own government. I should consider it as an act that would affect the neutral in some degree on this return voyage; for although a ship on her return is not liable to confiscation for having carried a cargo of contraband on her outward voyage, yet it would be a little too much to say that all impression is done away; because, if it appears that the owner had sent such a cargo under a certificate obtained on a false oath, that there was no contraband on board, it could not but affect his credit at least, and induce the court to look very scrupulously to all the actions and representations of such a person. The master says, that there was not more than was necessary for the ship's use; but this practice is, even with this apology, sufficiently alarming; be-

cause it has appeared that other ships have been employed in carrying naval stores to Batavia in the same manner; not as principal cargos, but in moderate quantities, under pretence of stores for the ship's use, but which, nevertheless, were sold, as these were, on their arrival at Batavia. It is apparent that the enemy may be supplied in this mode to a very great amount. What the master says in another place is rather contradictory to this pretence. He says, 'that there was not more than would be wanting for another ship, which he had a design of purchasing at Batavia.' Now, I must say, that it could by no means be allowed, that neutrals shall be at liberty to carry out a larger quantity of articles of this nature than are wanting for their own ship's use, under a speculation of purchasing other ships, and that when they are there the speculation shall be relinquished, and the contraband articles be then sold as stores in the colonies of the enemy. If the speculation was originally really and *bonâ fide* entertained, on failure of it, the surplus should either be brought back again, or sold in some neutral port of that quarter of the world; for neutrals can have no right to carry out double stores of this description for a contingent purpose, and then dispose of them to the enemy at their pleasure. The master says, 'that he was authorized to purchase a ship;' but there is no appearance of such a commission in the papers, nor are there any documents relating to it. The articles were entered in the invoice as being for sale, and the fact has actually taken place, that they were sold at Batavia. The owner swears that there were no prohibited goods destined for any of the parties now at war. It is not clear from this expression, whether he meant to swear that it was not for the port, or not for the use of an

enemy. It is a very equivocal term. It was certainly going to an enemy's port, and if it was to be sold there, in failure of the speculation of purchasing a ship there, it was then for the use of the enemy. Upon the whole, I think there was great reason to bring this case to adjudication. But after all the inquiry that has been made, I am of opinion that the property of the ship is sufficiently clear, and that there is nothing pointing to any other than a Danish interest in the cargo. If I saw on board anything of the nature of what has appeared in some other cases from Batavia, I should certainly look a little farther into it; but it appears to me that the outward shipment from Copenhagen was sent under the management of the master to invest the proceeds in the produce of Batavia. If the general nature of the transaction has rendered it liable to suspicion, I can only say, that it is a trade in which it is the duty of neutrals to observe a conduct perfectly circumspect, and consistent with all the obligations of good faith. But I am, under all the circumstances, satisfied that the property is as claimed, and I direct it to be restored."

Where naval stores have been laden on board neutral vessels, but before the time limited by the sovereign's notification of hostilities, and destined for his enemies, they will be sold to the sovereign for the benefit of the proprietors. (*The Maria Magdalena*, Hay & Marriott, 250.) The case of *The Vryheid* (ib. 188) was that of stores, so captured in a Dutch neutral ship on a voyage to an enemy's port of naval equipment, and claimed as protected by the treaty with Holland of 1674. They were sold for the king's use, and the proceeds of the sale were paid over to

the claimant, including freight and expenses. See also *The Vrow Antoinette* (ib. 142); *The Jonge Josters* (ib. 148); *The Concordia Affinitatis* (ib. 169); *The Hoppet* (ib. 217); *The Jonge Gertruyda* (ib. 246); *The Prudentia* (ib.); *The Concordia Sophia* (ib. 267); *The Drie Gebroeders* (ib. 270); *The Jonge Juffers* (ib. 272); *The Sarah and Bernhardus* (ib. 175).

When a vessel is taken, having on board a cargo of mixed goods, some of which are fit for her majesty's service, the Navy Board have the right of the pre-emption of such goods; and in order to reconcile neutrals to the exercise of this right, and to prevent the inconvenience that might arise to them from the separation of the cargo, it is thought advisable to purchase the other part of the goods on board. The captor is exonerated from the danger of costs and damages, and is fully indemnified by the payment of his expenses. (Lord Stowell, in *The Jonge Jan*, 1 Dodson, 458.)

Ship timber going to an enemy's port of naval equipment is contraband. (Lord Sowell, *The Endraught*, 1 Rob. 23.) In this case, besides the general law of nations, the treaty with Denmark having declared that "all articles which serve directly for the building of ships, unwrought iron and fir planks excepted, shall be deemed contraband, it was contended, against condemnation of the cargo, that the term "directly serve" meant specifically such timber as is most generally employed for ship building, and that the lading of *The Endraught*, balks of the length of only thirty feet, could not be so construed. This point the judge referred for the opinion of the principal persons employed in making repairs for ships or vessels be-

longing to Yarmouth, where the cargo lay, or, if there were no such persons, to the opinions of respectable shipwrights there.

In *The Eleonora Wilhelmina* (6 Rob. 331), Lord Stowell said,—"So as to other articles applicable for naval equipment. A ship under the Russian flag was captured on a voyage from Riga to Amsterdam with a cargo of wainscot pieces, boat masts, common spars and ruckers. Russia, by an order dated November, 1806 (recognized by the British government) had authorized her subjects 'to trade with France and her allies in innocent articles.' As far as the question turns upon the treaty, I am of opinion that the treaty must be held to apply only to cases where one party is in a state of neutrality, and not where both are connected in hostilities against one common enemy. The context of the whole treaty clearly refers to such a trade only, and cannot be extended to the trade of either country at a time when both countries are associated in war, and are bound to contribute their whole force and energy against the common enemy. It never could be the construction to be put on the order, that it should extend the protection to a mixed assorted cargo, consisting of articles partly innocent and partly noxious."

In *The Charlotte*, Koltzenberg (5 Rob. 305), masts and spars taken in a Lubeck ship on a voyage from Riga to Nantes, being the produce of Russia, and claimed as the property of a merchant in that country, were condemned as contraband. "Masts are to be considered as contraband, unless protected by treaty." (Also *The Staadt Embden*, 1 Rob. 29.)

Ship timber, with naval stores and materials for ship building, and even corn, grain and victuals of all

sorts, coming to the dominions of the enemy, were declared contraband by an ordinance of Charles I. in 1626.

In the case of *The Twende Brodre* (4 Rob. 33), a Danish ship, with a cargo of fir timber, spars, balks and deals, taken on a voyage from Christiansend to Saint Malo or Brest, and captured, was restored, the cargo being held not to be *bois de construction*, and therefore not contraband under the Danish treaty; but it would have held otherwise, if the vessel had been bound direct to a port of naval equipment. Lord Stowell said,—"The terms used in the treaty are *bois de construction;* but that must be understood *construction navale.* It must be confined to purposes of naval equipment. The great difficulty will be to ascertain what is properly to be considered as ship timber. Timber has frequently, from particular circumstances, a definite and determined character; it may be denoted by a particular form, as *knee timber*, which is crooked timber, peculiarly useful for the building of ships; or it may be distinguished by its dimensions and size; but as to other timber generally, which is as much a thing of ambiguous use as anything can be, the fair criterion will be the nature of the port to which it is going. If it is going to Brest, the destination may be reasonably held to control and appropriate the dubious quality, and fix upon it the character of ship timber; if to other ports of a less military nature, though timber of the same species, it may be more favourably regarded. It is the every day practice of this court not to consider as included within the prohibition all that a more extended interpretation might justify. It restores spars and balks of ordinary magnitude, unless there is something spe-

cial in the circumstances attending them to show they have a positive destination to naval purposes; *planches de sapin*—fir planks—being expressly excepted in the treaty, may, I hold, be carried anywhere. In other timber, of an indeterminable nature, the judicial test is to be sought from the destination under which it is going."

The executive government of the United States has frequently conceded, that the materials for the building, equipment and armament of ships of war, as timber and naval stores, are contraband. (Mr. Randolph's Letter to Mr. Adet, July 6, 1795; Mr. Pickering's Letter to Mr. Pinckney, January 16, 1797; Messrs. Pinckney, Marshall and Gerry's Letter to the French Minister, January 27, 1798.) But it does not seem that ship timber is, *in se*, in all cases to be considered a contraband article, though destined to an enemy's port. In the case of the Austrian vessel, *Il Volante*, captured by the French privateer *L'Etoile de Bonaparte*, and which was carrying ship timber to Messina, an enemy's port, it was held by the Council of Prizes at Paris, in 1807, upon the opinion of the Advocate-General, M. Collet Descotils, that the ship timber in that case was not contraband of war, it being ship timber of an ordinary character, and not exclusively applicable to the building of ships of war. (Merlin, Repertoire Universel et Raisonné de Jurisprudence, tome ix. tit. *Prise Maritime*, sec. 3, art. 3.)

As it is undoubtedly the prerogative of the sovereign to make new declarations of contraband, when articles come into use as implements of war which were before innocent, or had, in fact, no existence during former wars, the Lords of the Treasury, under the provisions of the Customs Consolidation Act, 16

& 17 Vict. c. 107, s. 55, have issued the following instructions to the officers of the Customs to prevent the exportation of steam machinery.

"Victoria Regina.

"Whereas by the Customs Consolidation Act, 1853, section 150, certain goods may, by proclamation or Order of her Majesty in Council, be prohibited either to be exported or carried coastwise, and whereas we, by and with the advice of our Privy Council, deem it expedient and necessary to prohibit the goods hereinafter mentioned either to be exported or carried coastwise, we, by and with the advice aforesaid, do hereby order and direct that, from and after the date hereof, all arms, ammunition and gunpowder, military or naval stores, and the following articles, being articles which we have judged capable of being converted into or made useful in increasing the quality of military or naval stores, that is to say, marine engines, screw propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler plates, fire bars, and every article or any other component part of an engine or boiler, or any article whatever which is, can or may become applicable for the manufacture of marine machinery, shall be and the same are hereby prohibited to be exported from the United Kingdom, or carried coastwise. Dated, Buckingham Palace, 18th February, 1854."

This proclamation has, however, since been modified by the proclamation issued on the 11th of April, 1854:—

"By the Lords of her Majesty's most honourable Privy Council.

"The Lords of the Council having taken into consideration certain applications for leave to export arms,

ammunition, military and naval stores, &c., being articles of which the exportation is prohibited by her Majesty's proclamation of February 18, 1854; their lordships are pleased to order, and it is hereby ordered, that permission should be granted by the Lords Commissioners of her Majesty's Treasury to export the articles so prohibited, to be carried coastwise to ports in the United Kingdom, and likewise to all places in North and South America, except the Russian possessions in North America; to the coast of Africa, west of the Straits of Gibraltar, and round the south and east coast of Africa; to the whole coast of Asia not within the Mediterranean Sea or the Persian Gulf, and not being part of the Russian territories; to the whole of Australia, and to all British colonies within the limits aforesaid, upon taking a bond from the persons exporting such prohibited articles that they shall be landed and entered at the port of destination; and that all further permission to export such articles to other parts of the world be only granted upon application to the Lords of the Council at this Board.

"C. C. GREVILLE."

Tallow is not considered contraband on a destination to such a port as Amsterdam, Amsterdam being a great mercantile port as well as a port of naval equipment; but it would be so to a port of naval equipment, such as Brest. (*The Neptunus*, 3 Rob. 108.)

Tin plates for canister shot put on board of a cartel ship by a British manufacturer at Dover were condemned as droit of Admiralty. (*La Rosine*, 2 Rob. 573.)

The conveyance of military or naval persons in the service of the enemy to an enemy's port is in the highest degree contraband. *The Friendship* (6 Rob.

420) was an American ship taken on a voyage from Baltimore to Bordeaux, with 30 tons of fustic, 4,414 hogshead staves, and 90 passengers, being French marines, shipped under the direction of the French minister in America. In condemning the ship and cargo, Lord Stowell said, "In order to determine how far the vessel was engaged in a commercial employment, I have little more to do than to look at the nature of this part or parcel of the cargo which she carries, for so it is called by the mate and also by the master. So little, however, do the French officers know of the lading, that they depose that there was no cargo on board, and repeat that there was not any lading over and over again. I observe this also more particularly with respect to the deposition of one person, M. Septans, who was more immediately concerned in the transaction, being a sort of superintendent over the rest. He says in three distinct places 'that there was no cargo on board.' I am rather led by this manner of deposing to conjecture that it would be found to be one of the conditions of the contract (if it could be inspected) *that there should not be any cargo taken on board*, but that the whole space should be reserved for the accommodation of the passengers; and that these witnesses speak correctly under the impression of their understanding of the contract 'that no cargo was on board.' On this evidence I may, I think, dispose of that part of the case which depends upon character, and may determine that the vessel has no commercial character belonging to her, that can be said to arise out of the nature of her lading. As far as it is contended that the ship cannot be considered as a transport because she had a cargo on board, I am of opinion that all such argument is effectually an-

swered, and that there was in the understanding of the parties no cargo on board; as indeed it is a common stipulation with transports that none shall be taken. It is said that there is nothing in the form of a charter party to denote the vessel to have been a transport under contract with the enemy's government. I know of no precise technical definition of transport vessels more than this, that they are vessels hired by the government to do such acts as shall be imposed upon them in the military service of the country. It is by no means essential to the character of a transport that she should be chartered in any particular manner, or in any particular form of words, or by any particular department of the government. In contracts made abroad, more especially where the same opportunities may not occur, it would be still less to be expected that they should be confined to particular forms. If French vessels are not to be found, others must be employed on their own terms. The form therefore is of no importance. The substance of the thing is this—whether they are vessels hired by the agents of the government for the purpose of conveying soldiers or stores in the service of the state? That is the substance, and it signifies nothing whether the men so conveyed are to be put into action on an immediate expedition or not. The mere shifting of drafts in detachments, and the conveyance of stores from one place to another, is an ordinary employment of a transport vessel, and it is a distinction totally unimportant whether this or that case may be connected with the *immediate active* service of the enemy. In removing forces from distant settlements there may be no intention of immediate action; but still the general importance of having troops conveyed to places where

it is convenient that they should be collected, either for present or future use, is what constitutes the object and employment of transport vessels. It would be a very different case if a vessel appeared to be carrying only a few *invalided* soldiers or discharged sailors, taken on board by chance and at their own charge. Looking at the description given of the men on board, I am satisfied that they are still as effective members of the French marine as any can be. Shall it be said then, that this is an innoxious trade, or that it is an innocent occupation of the vessel? What are arms and ammunition in comparison with men, who may be going to be conveyed perhaps to renew their activity on our own shores? They are persons in a military capacity, who could not have made their escape in a vessel of their own country. Can it be allowed that neutral vessels shall be at liberty to step in and make themselves a vehicle for the liberation of such persons, whom the chance of war has made in some measure prisoners in a distant port of their own colonies in the West Indies? It is asked, will you lay down a principle that may be carried to the length of preventing a military officer in the service of the enemy from finding his way home in a neutral vessel from America to Europe? If he was going merely as an ordinary passenger as other passengers do, and at his own expense, the question would present itself in a very different form. Neither this court nor any other British tribunal has ever laid down the principle to that extent. This is a case differently composed. It is the case of a vessel letting herself out in a distinct manner, under a contract with the enemy's government, to convey a number of persons, described as being in the service of the enemy, with their military character travelling with them, and

to restore them to their own country in that character. I do, with perfect satisfaction of mind, pronounce this to be a case of a ship engaged in a course of trade which cannot be permitted to neutral vessels, and without hesitation pronounce this vessel subject to condemnation.

The Hope (9th April, 1808) was the case of an American vessel captured on a voyage from Bordeaux to New York, having on board various despatches to the officers of government in the French West India Islands and the Isle of France. There was also on board a military officer of rank, aide-de-camp to General Villaret, who had lately come from Martinique and was returning to that island, and who had been shipped in the character of a merchant's clerk going to settle some outstanding accounts in New York. The court observed, notwithstanding the assertion of ignorance on the part of the master, it was scarcely credible that he could have been deceived with respect to the character of a military officer of high rank, so as be imposed upon by the disguise of a merchant's clerk.

When goods are once clearly shown to be contraband, confiscation to the belligerent captor ensues, as a matter of course. "Barely to stop such goods," says Vattel (Book 3, c. 7, s. 11), "would in general prove an ineffectual mode, especially at sea, where there is no possibility of entirely cutting off all access to the enemy's harbours. Recourse is, therefore, had to the expedient of confiscating all contraband goods that we can seize on, in order that the fear of loss may operate as a check on the avidity of gain, and deter the merchants of neutral countries from supplying the enemy with such commodities. And, indeed, it is an object

of such high importance to a nation at war to prevent, as far as possible, the enemy's being supplied with such articles as will add to his strength, and render him more dangerous, that necessity, and the care of her own welfare and safety, authorizes her to take effectual methods for that purpose, and to declare that all commodities of that nature, destined for the enemy, shall be considered as lawful prize. On this account she notifies to the neutral states her declaration of war; whereupon the latter usually give orders to their subjects to refrain from all contraband commerce with the nations at war, declaring that if they are captured in carrying on such trade the sovereign will not protect them. This rule is the point where the general custom of Europe seems at present fixed, after a number of variations. And, in order to avoid perpetual subjects of complaint and rupture, it has, in perfect conformity to sound principles, been agreed that the belligerent powers may seize and confiscate all contraband goods which neutral persons shall attempt to carry to their enemy, without any complaint from the sovereign of those merchants; and, on the other hand, the power at war does not impute to the neutral sovereigns these practices of their subjects."

It is necessary for a neutral, if he would escape the danger of these seizures, to be exceedingly circumspect in his whole voyage. From the case of *The Trende Sostre* (6 Rob. 387), it appears that he will not be permitted with impunity to touch at an enemy's port, if he have contraband goods on board, upon any excuse, however genuine, of selling other things less objectionable in their nature. Innocent articles, if they are so unfortunate as to be in company with ob-

noxious commodities, must take the ill consequences resulting from such an association. They must proceed to some other port, where the enemy is not established, and where the obnoxious commodities consequently lose their contraband character, and become fair articles of general trade. For though sail cloths and hemp are most mischievous materials, if they be sailing to a hostile market, yet a belligerent nation interposes no objection against the transfer of such commodities from a neutral possessor to her own subjects, or to another neutral."

Contraband is of an infectious nature, and contaminates the whole cargo, the innocence of any particular article not being usually admitted to exempt it from the general confiscation.

By the ancient law of Europe, contraband cargo rendered the ship also liable to condemnation. "Nor can it be said," said Lord Stowell, in *The Ringende Jacob* (1 Rob. 89), "that such a penalty is unjust, or not supported by the general analogies of law, for the owner of the ship has engaged it in an unlawful commerce. But in the modern practice of the Courts of Admiralty in this country (and I believe of other nations also) a milder rule has been adopted, and the carrying of contraband articles is attended only with the loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances."

Of all the "malignant and aggravating circumstances" operating against a ship charged with contraband, false destination and false papers are considered

as the most heinous. "These," said Lord Stowell, in *The Neutralitet* (3 Rob. 295), "constitute circumstances of aggravation that have been held to except the cases out of the modern rule and include them in the ancient." In *The Mercurius* (1 Rob. 288), Lord Stowell said: "Formerly, by the law of nations, the carrying of contraband articles of war worked a forfeiture of the ship. (Declaration of England and Holland against Spain, 17th of September, 1625, Art. 20; and treaty between England and France, November 3rd, 1653, Art. 15.) In modern practice, except where the contraband articles belong to the owner of the vessel, or where the case is attended by particular circumstances of aggravation, the penalty has been mitigated to a forfeiture of freight and expenses."

In the case of *The Charlotte*, Lord Stowell said: "The character of the port is immaterial, since naval stores, if they are to be considered as contraband, are so without reference to the nature of the port, and equally, whether bound to a mercantile port only, or to a port of naval military equipment. The consequences of the supply may be nearly the same in either case. If sent to a mercantile port, they may then be applied to immediate use in the equipment of privateers, or they may be conveyed from the mercantile to the naval port, and there become subservient to every purpose to which they could have been applied if going directly to a port of naval equipment."

By the case of *The Richmond*, Brattel (5 Rob. 336), the carrying pitch and tar to a legal port with the intention of selling them there, and if not, of carrying them on to an enemy's port for sale, is illegal, and the intention of so doing being proved, and that the ul-

terior destination was concealed, the vessel, the property of the same owners, was held liable in condemnation. So in the case of *The Charlotte*, Stromsten (1 Acton, 201), a Swedish ship laden with pitch, tar and deals, sailing under instructions to take British convoy from Lisbon in case the master should not be able to obtain a purchaser at Copenhagen for the ship and cargo, but afterwards detected entering a Dutch enemy's port, it was held by the Court of Appeal liable to condemnation with her cargo, notwithstanding the protest of the master, alleging the impossibility of obtaining convoy, and that the deviation was occasioned by his apprehension of capture by French cruizers, the suspicious circumstances in the case being held to remove all favourable construction usually applied with respect to the general trade of Sweden in such articles. In *The Jonge Tobias* (1 Rob. 330) Lord Stowell said:—"Formerly, according to the old practice, this cargo would have carried with it the condemnation of the ship; but in later times this practice has been relaxed, and an alteration has been introduced which allows the ship to go free, but subject to the forfeiture of freight on the part of the neutral owner. This applies only to cases where the owners of the ship and cargo are different persons. Where the owner of the cargo has any interest in the ship, the whole of his property will be involved."

No neutral state is bound by the law of nations to prohibit by its municipal law the exportation of contraband articles, and the only illegality of such importation consists in their liability to confiscation on capture by the other belligerent. (*The Santissima Trinidad*, 7 Wheat. 283.)

Contraband concealed in the outward voyage affects the ship on her return voyage. The rule holds, notwithstanding the vessel may have performed various different voyages and repeatedly changed her cargos at these several ports to which she may have traded from the time of her departure from her original port to the time of her return; nor is it necessary that the return cargo should be part proceeds of the contraband on the former voyage. "The principle," said Sir William Grant, in *The Margaret* (1 Acton, 335), "upon which this and other prize courts have generally proceeded in adjudication of cases of this nature appears simply to be this, that if a vessel carried contraband on the outward voyage, she is liable to condemnation on the homeward voyage. It is by no means necessary that the cargo should have been purchased by the proceeds of this contraband."

In *The Nancy* (3 Rob. 122), persons convicted of sending contraband articles to a settlement of the enemy in the West Indies, with false papers for another destination, were not allowed further proof of the return cargo being the proceeds of the contraband articles. The question of contraband does not arise where the ship was going into a blockaded port with articles that would have been contraband if they had gone in, but the master changed the destination on hearing of the blockade. (*The Imina*, 3 Rob. 167.)

Contraband articles are not only prize themselves, but affect innocent parts of the cargo belonging to the same person. Thus, in *The Staadt Embden* (1 Rob. 26), Lord Stowell condemned the whole cargo of deals and masts, the latter being contraband in the judgment even of the most zealous advocates of neutral com-

merce, on the ground "that no distinction could be made between these articles, because they were all the property of the same claimant; for although a mixture of contraband articles may not affect innocent articles the property of a different owner, it contaminates every part of the cargo belonging to the same person, and makes it subject to confiscation. The same principle is strongly enforced by Bynkershoeck throughout the whole of his twelfth chapter: "*Sed omnino distinguendum putem,*" says he, "*an licitæ et illicitæ merces ad eundem dominum pertineant, an ad diversos, si ad eundem omnes rectè publicabuntur ob continentiam delicti.*"

The general rule, that where a capture is made of a cargo, the property of an enemy carried in a neutral ship, the neutral shipowner obtains against the captor those rights which he had against the enemy, does not apply to the case of contraband. "If, said Lord Stowell, in *The Emanuel* (1 Rob. 296), "an enemy puts on board a neutral vessel a cargo belonging to himself, which is a contraband cargo, and that cargo is taken, it is condemnable to the captor; but the court will not consider itself as bound to enforce the payment of freight against the captors, although, at the same time, the neutral shipowner might have just reason to demand it from the enemy with respect to whom his contract has been performed, so far as he had not been disabled from fulfilling it by the very circumstance of the other contracting party having put a cargo of that species on board, and consequently exposed the vessel to hostile seizure; and the court may, in like manner, not consider itself under any obligation to say, in other instances, that the captors

are liable to the charge of freight; although it may be a good and valid demand against the owner, which the parties must settle elsewhere."

There are certain cases, however, in which contraband articles may be brought in, not for confiscation but for pre-emption. In the case of *The Haabet* (2 Rob. 174), Lord Stowell said, "The right of taking possession of cargos of this description (*commeatus*—provisions) going to the enemy's ports is no peculiar claim of this country; it belongs generally to belligerent nations. The ancient practice of Europe, or at least of several maritime states of Europe, was to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times of holding such cargos subject only to a right of pre-emption, that is, to a right of purchase upon a reasonable compensation to the individual whose property is thus diverted. I have never understood that, on the side of the belligerent, this claim goes beyond the case of cargos avowedly bound to the enemy's ports, or suspected, on just grounds, to have a concealed destination of that kind; or that on the side of the neutral, the same exact compensation is to be expected which he might have demanded from the enemy in his own port. The enemy may be distressed by famine, and may be driven by his necessities to pay a famine price for the commodity, if it gets there. It does not follow that, acting upon my rights of war in intercepting such supplies, I am under the obligation of paying that price of distress. It is a mitigated exercise of war on which my purchase is made, and no rule has established that such a purchase shall be regulated

exactly upon the same terms of profit which would have followed the adventure if no such exercise of war had intervened. It is a reasonable indemnification and a fair profit on the commodity that is due, reference being had to the original price actually paid by the exporter, and the expenses which he has incurred. As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms; but certainly the capturing nation does not always take these cargos on the same terms on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust captors; for these are not unjust captures, but authorized exercises of the rights of war." "Pre-emption," observed the learned judge, in *The Sarah Christina* (1 Rob. 241), "is no unfair compromise between the belligerent rights, founded on the necessities of self-defence, and the claims of the neutral to export his native commodities, though immediately subservient to the purposes of hostility."

The Danish government has issued a declaration containing its definitions of contraband, which includes horses, timber for construction of vessels, tar, copper-plates, sailcloth, canvas, hemp, cordage, &c., but not coals; besides, the royal Danish ordinance of May 4th, 1803, is renewed. So, no Danish pilots, or men acquainted with the Danish straits and seas, are allowed to serve on board the belligerent powers' vessels. In the instructions for the commanders of the Danish guard ships, they are instructed to observe a strict

neutrality—to protest against the taking of captured war or merchant vessels into Danish ports, but not to oppose it by force, and only to use force against privateers. The Danish territory is to be considered to extend one Danish sea mile from the coast, except at Kromborg and the river Elbe at Gluckstadt, where the distance is named as three thousand ells—six thousand feet.

RIGHT OF SEARCH.

The rights of a belligerent nation against the delinquencies of neutrals would exist in vain if she were not armed with a practical power, by which those rights may be enforced. Such a power, by the law of nations, regularly exists; and it is called the power of visitation and search. "We cannot prevent the conveyance of contraband goods," says Vattel (Book iii. c. 7, s. 114), "without searching neutral vessels that we meet at sea. We have, therefore, a right to search them." This is clear and satisfactory. If, upon making this search, the vessel be found employed in contraband trade, or in carrying despatches or troops, or in any other illegal commerce, she is brought in for adjudication in the Court of Admiralty. If, on the other hand, her commerce appear to be legitimate, she is dismissed without further molestation or inconvenience.

Neutrals have made many struggles against this right of visitation and search, and particularly by the celebrated league, which was formed during the American war, with the Empress of Russia at its head. A declaration, dated the 28th February, 1781, was delivered to the minister of each of the belligerent

powers, purporting, "that neutral ships ought to be at liberty to navigate freely from port to port, and upon the coast of the nations at war; that the goods and effects of the subjects of the belligerent powers should be free, with the exception of contraband goods; that no goods should be considered as contraband, but such as were specified in the 10th and 11th articles of the treaty of commerce between Russia and Great Britain, dated 20th of June, 1766; that to ascertain what should be deemed a blockaded port, it was determined that none should be admitted to come within that description, but such only, where, by reason of the near approach of the ships employed in the attack, there was an apparent danger that they would be able to enter it. And finally, that these principles should serve as a basis for all proceedings and judgments upon the legality of prizes."

The right of visitation and search was not strictly enforced by Great Britain under these circumstances; but it was not abandoned. Similar attempts, subsequently made, have been defeated and totally overthrown, and the right at this day subsists practically as well as theoretically. Such opposition (illegal according to the soundest principles of international jurisprudence) is adverted to in terms of strong disapprobation by three of the judges in *Garrels* v. *Kensington* (8 T. R. 230).

The whole international law upon this subject is thus summed up by Lord Stowell, in his judgment on the case of *The Maria* (1 Rob. 340). "The right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargos, whatever be the destinations, is an incontestable

right of the lawfully commissioned cruizers of a belligerent nation. I say, be the ships, the cargos, the destinations, what they may, because, till they are visited and searched, it does not appear what the ships, or the cargos, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because, if you are not at liberty to ascertain by sufficient inquiry whether there is property that can be legally captured, it is impossible to capture. Even those who contend for the inadmissible rule, that *free ships make free goods*, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant with subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force—something in the nature of civil process, where force is employed, but a lawful force, which cannot lawfully be resisted. For it is a wild conceit that wherever force is used, it may be forcibly resisted; a lawful force cannot lawfully be

resisted. The only case where it can be so in matters of this nature, is in the state of war and conflict between two countries, where one party has a perfect right to attack by force, and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other, no such conflicting rights can possibly co-exist.

"Second.—The authority of the sovereign of the neutral country being interposed in any manner of mere force cannot legally vary the rights of a lawfully-commissioned belligerent cruizer; I say legally, because what may be given, or be fit to be given, in the administration of this species of law, to considerations of comity or of national policy, are views of the matter which, sitting in this court, I have no right to entertain. All that I assert is, that legally it cannot be maintained that if a Swedish commissioned cruizer, during the wars of his own country, has a right by the law of nations to visit and examine neutral ships, the king of England, being neutral to Sweden, is authorized by that law to obstruct the exercise of that right with respect to the merchant ships of his country. I add this, that I cannot but think that, if he obstructed it by force, it would very much resemble (with all due reverence be it spoken) an opposition of illegal violence to legal right. Two sovereigns may unquestionably agree, if they think fit, as in some late instances they have agreed (Treaty between Holland and America, 1782, Art. 10), by special covenant, that the presence of one of their armed ships along with their merchant ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant ships inconsistent with amity

or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search to be exercised by those who have the interest in making it. I am not ignorant that, amongst the loose doctrines which modern fancy, under the various denominations of philosophy and philanthropy, and I know not what, have thrown upon the world, it has been within these few years advanced, or rather insinuated, that it might possibly be well if such a security were accepted. Upon such unauthorized speculations it is not necessary for me to descant. The law and practice of nations (I include particularly the practice of Sweden when it happens to be belligerent) give them no sort of countenance; and until that law and practice are new modelled in such a way as may surrender the known and ancient rights of some nations to the present convenience of other nations (which nations may perhaps remember to forget them when they happen to be themselves belligerent), no reverence is due to them. They are the elements of that system which, if it is consistent, has for its real purpose an entire abolition of capture in war; that is, in other words, to change the nature of hostility as it has ever existed amongst mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were fit that such a state should be introduced, it is at least

necessary that it should be introduced in an avowed and intelligible manner, and not in a way which, professing gravely to adhere to that system which has for centuries prevailed amongst civilized states, and urging at the same time a pretension utterly inconsistent with all its known principles, delivers over the whole matter at once to eternal controversy and conflict at the expense of the constant hazard of the harmony of states, and of the lives and safeties of innocent individuals.

"Thirdly.—That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. For the proof of this I need only refer to Vattel, one of the most correct, and certainly not the least indulgent, of modern professors of public law. In Book 3, c. 7, s. 114, he expresses himself thus:—'It is not possible to prevent the transport of contraband goods, if the neutral vessels met at sea are not visited as we are entitled to visit them. Several powerful nations have, at different times, refused to submit to that search. At the present day, a neutral vessel refusing to suffer to be searched would be condemned on that single ground alone, as being good prize.' Vattel is here to be considered not merely as a lawyer delivering an opinion, but as a witness asserting a fact—the fact that such is the existing practice of modern Europe. And to be sure the only marvel in the case is, that he should mention it as a law merely modern, when it is remembered that it is a principle not only of the civil law (on which great part of the law of nations is founded), but of the private jurisprudence of most countries in Europe,—that a contumacious refusal to submit to fair inquiry infers all the penalties of con-

victed guilt. Conformably to this principle, we find in the celebrated French Ordinance of 1681, now in force, Art. 12, '*that every vessel shall be good prize, in case of resistance and combat;*' and Valin, in his smaller Commentary, p. 81, says expressly, that although the expression is in the conjunctive, yet that the *resistance alone is sufficient.* He refers to the Spanish Ordinance, 1718, evidently copied from it, in which it is expressed in the disjunctive, 'in case of resistance or combat.' And recent instances are at hand and within view, in which it appears that Spain continues to act upon this principle. The first time in which it occurs to my notice on the inquiries I have been able to make in the Institutes of our own country, respecting matters of this nature, excepting what occurs in the Black Book of the Admiralty, is in the Order of Council, 1664, Art. 12, which directs, 'that when any ship met withal by the royal navy, or other ship commissionated, shall fight or make resistance, the said ship and goods shall be adjudged lawful prize.' A similar article occurs in the Proclamation of 1672. I am aware that in those orders and proclamations are to be found some articles not very consistent with the law of nations as understood now, or indeed at that time; for they are expressly censured by Lord Clarendon. (Life, p. 242.) But the article I refer to is not of those he reprehends; and it is observable that Sir Robert Wiseman, then the king's Advocate-General, who reported upon the articles in 1673, and expresses a disapprobation of some of them as harsh and novel, does not mark this article with any observation of censure. I am therefore warranted in saying that it was the rule, and the undisputed rule, of the

British Admiralty. I will not say that that rule may not have been broken in upon in some instances by considerations of comity or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them; for no man can deny that a state may recede from its extreme rights, and that its supreme councils are authorized to determine in what cases it may be fit to do so, the particular captor having in no case any other right and title than what the state itself would possess under the same facts of capture. But I stand with confidence upon all fair principles of reason,—upon the distinct authority of Vattel,—upon the Institutes of other great maritime countries, as well as those of our own country,—when I venture to lay it down that by the law of nations, as now understood, a *deliberate* and *continued* resistance to search, on the part of a neutral vessel to a lawful cruizer, is followed by the legal consequence of confiscation."

The duty of self-preservation gives to belligerent nations this right. It is founded upon necessity, and is exclusively and strictly a war right, and does not rightfully exist in time of peace unless conceded by treaty. (*Le Louis*, 2 Dod. 248; *The Antelope*, 10 Wheaton, 119.) The British government, indeed, by statute in August, 1839, in order more effectually to suppress the slave trade, and especially as against Portugal, a power that had grossly violated her treaty with this country on that subject, authorized the power of visitation and search in time of peace. The British parliament, however, disclaims generally the right of search in time of peace, though it claims at all times the right

of visit, in order to know whether a vessel pretending for instance to be American, and hoisting the American flag, is really what she seems to be. (Lord Aberdeen's dispatch of Dec. 1841 to the American minister, Mr. Stevenson.) But the government of the United States does not admit the distinction between the right of visitation and the right of search. It considers the difference to be rather one of definition than of principle, and that it is not known to the law of nations; it will not admit the exercise of the claim of visit to be a right; while the British government concedes, that, if in the exercise of the right of visit to ascertain the genuineness of the flag which a suspected vessel bears any injury ensues, prompt reparation would be made. The intervisitation of ships at sea is a branch of the law of self-defence, and is in point of fact practised by the public vessels of all nations, including those of the United States, when the piratical character of a vessel is suspected. The right of visit, as distinct from the right of search, has been termed, by the Supreme Court of the United States, the right of approach for that purpose (*The Mariana Flora*, 11 Wheaton, 143); and it is considered to be well warranted by the principles of public law and the usages of nations. (Bynk. lib. 1, c. 114.)

Neutral vessels, as we have said, have frequently been disposed to question and resist the exercise of this right. This was particularly the case with the Baltic confederacy during the American war, and with the convention of the Baltic powers in 1801. The right of search was denied, and the flag of the state was declared to be a substitute for all documentary

and other proof, and to exclude all right of search. These powers armed for the purpose of defending their neutral pretensions; and England did not hesitate to consider it as an attempt to introduce by force a new code of maritime law, inconsistent with her belligerent rights and hostile to her interests, and one which would go to extinguish the right of maritime capture. The attempt was speedily frustrated and abandoned, and the right of search has since that time been considered incontrovertible. In the convention between England and Russia of the 17th of June, 1801, Russia admitted the belligerent right of search, even of merchant vessels navigating under convoy of a ship of war, provided that it was exercised by a ship of war belonging to government. The government of the United States also admits the right of visitation and search by belligerent government vessels of their merchant vessels, for enemy's property, articles contraband of war, or men in the land or naval service of the enemy; but it does not understand the law of nations to authorize, and does not admit, the right of search for subjects or seamen; while England on the other hand asserts the right to look for her subjects on the high seas, into whatever service they might enter and will not renounce it. This difference was one principal cause of the war of 1812, and remains unsettled to this day. In the discussions of 1842, between Lord Ashburton and Mr. Webster, relative to the boundary line of the State of Maine, the American minister intimated that the rule hereafter to be insisted upon would be "that every regularly documented American merchant vessel would be evidence that the seamen on board were American and

would find their protection in the flag which was over them."

The right of search is confined to private merchant vessels, and does not apply to public ships of war, whose immunity from the exercise of any jurisdiction, but that of the sovereign power to which they belong, is uniformly asserted and conceded. (*The Prins Frederick*, 2 Dod. 451; *The Exchange* v. *McFadden*, 7 Cranch, 116, *L'Invincible*, 1 Wheat. 238.)

The right of visitation and search must be conducted with as much regard to the safety of the vessel detained as is consistent with a thorough examination of the character and voyage. If the neutral has acted with candour and good faith, and the inquiry has been wrongfully pursued, the belligerent cruizer is responsible to the neutral in costs and damages. (*The Anna Maria*, 2 Wheat. 327.) The mere exercise, indeed, of the right of search involves the cruizer in no trespass, for it is strictly lawful; but if he proceeds to capture the vessel as prize, and sends her in for adjudication, and there be no probable cause, he is responsible. It is not the search, but the subsequent capture, which in such a case is treated as a tortious act (2 Mason, 439). If the capture be justifiable, the subsequent detention for adjudication is never punished with damages. To detain for examination is a right which a belligerent may exercise over every vessel, except a national vessel, which he meets with on the ocean. This right necessarily carries with it all the means essential to its exercise; among these may sometimes be included the assumption of the disguise of a friend or of an enemy, which is a lawful stratagem of war. If in

consequence of the use of this stratagem, the crew of vessel detained abandon their duty before they are actually made prisoners of war, and the vessel is thereby lost, the captors are not responsible. (*The Eleanor*, 2 Wheat. 345.) In strictness of law belligerents have no right to compel neutrals to bring their papers on board of the searching ship. The search should be made on board of the neutral, and all that the latter is obliged to do, is to act fairly and frankly in the disclosure of his papers and voyage, and to offer no resistance to complete and thorough examination of his vessel and cargo. But though it be an irregularity to compel a neutral, under the terror of a superior force, to leave his own ship and submit to examination and search elsewhere, yet it is an irregularity in the exercise of a known right, and no penalty has ever been attached to its commission. (*The George*, 1 Mason, 24.) Where there is no right to visit and search, there can be no right to seize and bring in for adjudication.

When the right of visitation and search is exercised upon a neutral vessel, the first object of inquiry is generally the ship's papers. The following are the papers and documents which are usually required by way of evidence of a vessel's neutral character, and which are, therefore, expected to be uniformly found on board:—

1. *The Passport.*—This is a permission from the neutral state to the captain or master of the ship to proceed on the voyage proposed, and usually contains his name and residence, the name, description, and designation of the ship, with such other matters as the

practice of the place requires. This document is indispensably necessary for the safety of every neutral ship. Hubner says, this is the only paper that is rigorously insisted upon by the Barbary corsairs, by the production of which alone their friends are protected from insult.

A General Pass is a thing not to be admitted; it is not to be said that it is immaterial whether it be granted to A. or to B. If the real interest is neutral, a pass should describe explicitly one of the partners of a house of trade at least. On this principle, Lord Stowell refused to restore *The Hoop* (1 Robinson, 129), claimed by the master for a M. Uven, of whom, however, the master on his deposition knew nothing, and whose name did not appear on the ship's pass. "It is the established rule," said Lord Stowell, in *The Elizabeth* (5 Rob. 4), "that a vessel sailing under the colours and pass of a nation is to be considered as clothed with the national character of that country. With goods it may be otherwise, but ships have a peculiar character impressed upon them, by the special nature of their documents, and have always been held to the character with which they are so invested, to the exclusion of any claims of interest that persons living in neutral countries may actually have in them."

2. The sea letter, or sea brief, which specifies the nature and quantity of the cargo, the place from whence it comes, and its destination. This paper is not so necessary as the passport, because that, in most cases, supplies its place.

3. The proofs of property, which ought to show that the ship really belongs to the subjects of a neutral state. If she appear to either belligerent to have been

built in the enemy's country, proof is generally required that she was purchased by the neutral before, or captured and legally condemned since the declaration of war; and in the latter case, the bill of sale, properly authenticated, ought to be produced.

4. The muster roll *(role d'équipage)* contains the names, ages, quality, place of residence, and, above all, the place of birth of every person of the ship's company. This document is of great use in ascertaining the ship's neutrality. It must naturally excite a violent suspicion, if the majority of the crew be found to consist of foreigners; still more, if they be natives of the enemy's country.

5. The charter party. This instrument serves to authenticate many of the facts, on which the proof of the ship's neutrality must rest, and is, therefore, extremely necessary.

6. The bill of lading, by which the captain acknowledges the receipt of the goods specified therein, and promises to deliver them to the consignee, or his order. Of this there are usually several duplicates, of which one is delivered to the captain, one kept by the shipper of the goods, and one transmitted to the consignee. This instrument, being only the evidence of a private transaction between the owner of the goods and the captain, does not carry with it the same degree of authenticity as the charter party.

7. The invoices, which contain the particulars and prices of each parcel of goods, with the amount of the freight, duties, and other charges thereon, which are usually transmitted from the shippers to their factors or consignees. These invoices prove by whom the goods were shipped, and to whom consigned. They

carry with them, however, but little authenticity, being easily fabricated, where fraud is intended.

8. The log-book, or ship's journal, which contains an accurate account of the ship's course, with a short history of every occurrence during the voyage. If this be faithfully kept, it will throw great light on the question of neutrality. If it be in any respect fabricated, this may, in general, be easily detected.

9. The bill of health, which is a certificate, properly authenticated, that the ship comes from a place where no contagious distemper prevails, and that none of the crew, at the time of her departure, were infected with such distemper.

A master must have knowledge as to his cargo. The court will not lay down a rule so harsh as to require that every carrier master should know the property of every part of her cargo, yet in time of war, it cannot be unknown to neutrals that the master is expected to speak to the property of his cargo. (Lord Stowell, *The Eenrom*, 2 Robinson, 15.)

Instructions should be fully produced by masters of ships to cruizers. "The conduct of the master in withholding his instructions till the time of examination, was certainly incorrect (Lord Stowell, *Concordia*, 1 Rob. 120); it is a master's duty to *produce all his papers*, and least of all to withhold his instructions, which are very important papers to be communicated for the interest of both parties—important both to the owner and the captor."

Alternative destination should be disclosed in the papers and depositions; it ought to be stated at first. (Lord Stowell, *The Juffrau Anna*, 1 Robinson, 120.) "To make a voyage fairly alternative, it should ap-

pear on the papers to be so; for otherwise it must mislead the cruizers of the belligerent countries, and prevent them from forming a right judgment of their case. In *The Juffrau Anna* (1 Roinson, *ub. sup.*), Lord Stowell refused the privilege of farther proof, on the ground of *mala fides*, as to alleged alternative destination, the orders to the master being *to go to Ostend, if not obstructed by British cruizers.*" The master," said Lord Stowell, "was to use his best endeavour to get to Ostend, and only to take another destination if he should be prevented from accomplishing the first. This is scarcely to be considered as an alternative destination."

"General clearances (as to the East or West Indies) I cannot say are absolutely and necessarily illegal, although they are certainly inconvenient to all parties by throwing a great uncertainty on the nature of the intended voyage; if neutral governments permit these indefinite clearances, which seem to allow a destination to the ports of the belligerent (if such belligerent has any ports to the East or West Indies), it seems proper, at least, that the nature of the cargo should correspond, and care should be taken that the cargo should be such as their subjects are allowed to carry to an enemy's port. There should be an affidavit, as in voyages to an enemy's port, that the cargo contains no prohibited goods; for without some precaution of this kind, great frauds may be committed against the public treaties of the country, and the country may be involved in the consequences of such frauds." (Lord Stowell, *The Eenrom*, 1 Rob. 6.)

Though by the law of nations, the want of some of these papers may be taken as strong presumptive

evidence, yet the want of none of them amounts to conclusive evidence against a ship's neutrality. (8 T. R. 434—437; Parke, 363—562.) "Such papers," says Lord Stowell, in *The Odin* (1 Rob. 252,) "duly verified and supported, are strong *primâ facie* evidence in all cases, and, if unopposed, are conclusive evidence; but if there are circumstances and facts appearing in the case, leading justly to the conclusion that those papers, though formal in themselves, and though formally supported by oath, are nevertheless false, it would be ridiculous to say that the court is bound by them. It is a wild conceit, that any court of justice is bound by mere swearing; it is the swearing credibly that is to conclude its judgment. Unquestionably, a Court of Admiralty will proceed with all requisite caution in determining against regular papers, regularly supported; but if the papers say one thing, and the facts of the case another, the court must exercise a sober judgment, and determine, according to the common rules of evidence, to which the preponderance is due. The rule is, as I have always understood it in the Court of Admiralty, that papers by themselves prove nothing; they are a mere dead letter, if they are not supported by the oaths of persons in a situation to give them validity. Those who look back to the elaborate exposition of the proceedings of our Courts of Admiralty, in the answer to the Prussian memorial, will find this to have been laid down as a fundamental position, "that the master must verify his papers." It is true, that in the case of a carrier master, it may be expected that the verification should be less positive than where he is himself the agent; but this is expected, that he should depose at least that he

believes the cargo to be as asserted in the claim; less than that I never remember to have been accepted in any case; and if it were necessary for me to apologise for the rules which I find established in this court, I think this might be vindicated on every principle of reason and justice. When a cargo is taken on board in an enemy's port, and that port blockaded, (which is a circumstance of some weight, as affording a greater temptation to fraud,) if the master is not required to say even that he believes the property to be as claimed, it would open the door to every sort of abuse.

"Where, between the two species of evidence of prize," said Lord Stowell, in *The Vigilantia* (1 Rob. 1), "the depositions and documents, there is a repugnance, the conviction of the Court of Admiralty must, as a general rule, be kept *in equilibrio*, till it can receive further proof; but it is a rule by no means inflexible; it is liable to many exceptions: the exceptions may sometimes be in favour of depositions, and sometimes, though more rarely, on the side of the documentary evidence. A case may exist in which the witnesses may appear to speak with such a manifest disregard to truth, that the court may decide in favour of papers bearing upon them all the characters of fairness and veracity. On the other hand, it may happen, and does more frequently happen, that the papers may betray such a taint and leaven of suspicion on the face of them, as will give a decided preponderancy to the testimonies of the witnesses examined, especially if these witnesses give a natural account of the part they took in the transaction, and in a manner so distinct and clear, as to carry with it every degree of moral probability. The propriety of this practice will be best

illustrated by an example. Let us suppose the case of a ship furnished with documents, before there has arisen any apprehension of a war; there could then be no reason for the introduction of fraudulent papers; fraud is always inconvenient, and seldom adopted as a matter of choice; under such circumstances there is no particular ground of suspicion against the documents: —but on the other side, suppose that there is a war, or the apprehension of a war, when the documents are composed in that decided, or in that doubtful state of things, they become subject to some suspicions *in limine*, which suspicion may be increased by their having passed through the enemy's hands. The suspicion will be still further increased, if the property to which they relate has continued under the management or direction of the enemy. And if, in addition to all this, they carry such contradictions or difficulties on the face of them as cannot be explained, admitting the matter to be a fair transaction, all or any of these circumstances must divest the papers of their natural credit."

"It is insisted as a reasonable rule," said Lord Stowell, in *The Calypso* (2 Rob. 158), "that in cases where some papers are produced at first, and others kept back, you are to suppose the papers not produced to state the true and exact measure of interest. I allow that all the papers are to be taken together, but I cannot go so far as to admit that concealed papers are to be taken as necessarily containing the truth, because if such a rule was established as a principle of this court, it would let in an infinity of fraud, and make it the easiest thing in the world to protect the chief bulk of property in any case by giving up some

part upon the pretended disclosures contained in these concealed papers. The more reasonable rule would be, that where there is one set of papers admitted to be false, and another set coming out of the same hands, that the whole is thrown into a state of uncertainty and doubt."

"It has been said" (remarked Lord Stowell, in *The Calypso*, ub. sup.), "that false papers will not, by the law of this court, necessarily lead to condemnation, if the proof of property is clear; and that papers, false as to the destination, will not stand in the way of restitution, under the practice of the Admiralty of this country. It has been said, also, and truly, that evidence respecting the cargo does not generally affect the ship, as it may frequently happen that the owners of the cargo will, from lust of gain, put on board false papers without the knowledge or privity of the owners of the ship. But it is a very different case when the ship and cargo belong to the same persons; and, although I will not say that false papers would, even in such a case, necessarily lead to condemnation of the ship." The spoliation of papers is a still more aggravated and inflamed circumstance of suspicion. This fact may exclude further proof, and be sufficient to infer guilt; but it does not in England, or in the United States, as by the maritime law of other countries, create an absolute presumption *juris et de jure*. The spoliation of papers may be a circumstance open for explanation, for it may have arisen from accident, necessity, or superior force. (*The Pizarro*, 2 Wheat. 227.) If the explanation, however, be not prompt and frank, or be weak and futile,—if the cause labours under heavy suspicions, or there be a vehement presumption

of bad faith, or gross prevarication, it is good cause for the denial of further proof; and the condemnation ensues from defects in the evidence which the party is not at liberty to supply. In *Bernardi* v. *Motteaux* (Doug. 581), Lord Mansfield observed, that by the maritime law of all countries, throwing papers overboard is considered a strong presumption of enemy's property; though in all his experience he had never known a condemnation on that circumstance only. In *The Two Brothers* (1 Rob. 133), however, Lord Stowell said: "No rule can be better known, than that neutral masters are not at liberty to destroy papers; or if they do, that they will not be admitted to explain away such a suppression, by saying, 'that they were only private letters.' In all cases it must be considered a proof of *mala fides;* and where that appears, it is an universal rule to presume the worst against those who are convicted of it: it will always be supposed that such letters relate to the ship or cargo; and that it was of material consequence to some interests, that they should be destroyed.

"Duly documented is altogether a relative term; for a vessel may be duly documented in one case by papers which would not be sufficient documents in another. Thus, in ordinary cases, a Danish ship would be duly documented by a Danish pass, and other papers; but if she appeared to have been bought in the enemy's country during the war, a bill of sale would be necessary, and that duly verified and supported." "By fully documented papers, I mean regular papers, supported by the knowledge and testimony of the master." (Id. *The Adriana*, ib. p. 317.)

It had been supposed, that under the terms of the

declaration, issued by her Majesty on the 28th of March, 1854, it was her Majesty's intention, to some extent, to relax the right of search. On the 30th of March, the Attorney-General stated, in answer to a question from Mr. Mitchell, that "it was never intended to give up, nor did the declaration give up, the right of searching neutral vessels. It was impossible to give up that right; and this country still maintains its right to search and seize vessels which carry enemy's despatches, or articles contraband of war."

CAPTURE.

With respect to the commerce of the enemy subsisting abroad, as there are, for the most part, no general ties of faith that confine the common rights of capture, the broad principle is, that such commerce is liable, by the acknowledged law of nations, to be seized and appropriated by the adverse belligerent wherever it is found. Capture, properly so called, bearing avowedly a warlike complexion, is said to be made (2 Marshall on Insurance, 422) where a ship is subdued and taken, either by a pirate or by an enemy, whether in open war or by way of reprisals, and whether with intent to appropriate both ship and cargo, or only certain hostile or contraband goods found on board. Of capture by a pirate, nothing need be said, for that is illegal by all laws, human and divine: we confine ourselves to the consideration of capture by an enemy. The case of *The Jonge Jacobus*, Baumann (1 Rob. 243), is a striking instance of what may, or

may not, be considered a capture; the vessel bearing that name was boarded one morning by an officer and several men belonging to *The Apollo* frigate, then lying stranded and in distress, who told the master, a neutral, that he must go down to the assistance of the frigate. The master accordingly went down, and took the whole of the crew on board, to the number of one hundred and seventy or one hundred and eighty men. The ship arrived at Yarmouth three days afterwards, and was navigated, during the passage, by the master himself and his own crew, except that the pilot belonging to the frigate steered through the banks of Yarmouth. On arriving at Yarmouth, the persons who had been thus preserved had the ingratitude to proceed against the ship as a prize, which they alleged themselves to have taken, on a suspicion of her being engaged in a hostile trade. Lord Stowell said: "If the ship had really belonged to an enemy, in my opinion the character of enemy itself must have been blotted out and obliterated by such a service as this. If I was compelled to condemn this ship, it would be a most reluctant condemnation indeed. I hope and trust that, if the circumstances are true as stated by the master, a condemnation of the vessel would be the very last thing to present itself to the expectation of the asserted captors."

The legality of a capture may, under circumstances, exclusively depend upon the ordinances of the government of the captors. If, for instance, the sovereign should by a special order authorize the capture of neutral property for a cause manifestly unfounded in the law of nations, there can be no doubt, that it would afford a complete justification of the captors, in all tribunals

of prize. The acts of subjects, however, done under such orders of their sovereign, are not cognizable by foreign courts. If such acts be a violation of neutral rights, the only remedy is by an appeal to the sovereign, or by a resort to arms. A capture, therefore, under the Berlin and Milan decrees, or the celebrated orders in council of 1812, although they might be violations of neutral rights, must still have been deemed, as to the captors, a rightful capture, and have authorized the exercise of all the usual rights of war. It is quite another question, whether a tribunal of prize would lend its aid to enforce such captures, though perhaps, in the strictness of natural law, it would be bound to abstain from all obstruction of the captors. (*Le Maisonnaire and others* v. *Keating*, 2 Gallison, 334.)

To constitute a valid capture, some act should be done indicative of an intention to seize and retain as prize; and it is always sufficient if such intention is fairly to be inferred from the conduct of the captor. (*The Grotius*, 9 Cranch, 368.)

A capture made within neutral waters is, as between the belligerents, deemed to all intents and purposes rightful; it is only by the neutral sovereign that its legal validity can be called in question, and as to him and him only is it to be considered void. If, however, when both vessels are in neutral waters, the captured ship first commenced hostilities upon the captor, she forfeits the neutral protection, and the capture is valid. (*The Anne*, 3 Wheaton, 435.)

There is no uniform rule among nations as to the time when property vests in captors. Nations concur in principle, indeed, so far as to require firm and secure possession; but their rules of evidence as to

the fact of possession are not uniform. (*The Santa Cruz*, 1 Rob. 50.) In *The Rebekah* (1 Rob. 233), Lord Stowell, on this point, said:—"The first question that will occur refers to the time of the capture, whether that is to be dated from the actual taking possession, or the previous striking of the colours; and I think that the striking of the colours is to be deemed the real *deditio*. If the French had succeeded in their attempt to defeat that surrender, then the actual final taking of possession must have been alone considered; but as that attempt failed, I am of opinion that the act of formal submission having never been effectively discontinued, must be deemed the consummation of the capture—and if so, the next question will be, where the vessel was at the time this act took place? And this is proved to have been, when 'she was about to go into the road to anchor there;' for such is the expression of the witness upon the third interrogatory, which points more immediately to the place of capture; although on the 19th, which is pointed only to the general course of the vessel on her voyage, he says, 'she put into the road there.' The second witness describes her as merely 'passing by the Isle of Marcou at the time;' and the third says, in the language of the first, that 'she was about to go into the road to anchor there.' Clearly, by all these descriptions, she had not entered the road, and she was under sail at the time she struck her colours. In point of locality, then, the claim of the admiral is not founded, for she was not *in ipsis faucibus;* she was about to enter, but was not actually entering, and that is the point at which the Admiralty right commences."

The case of *The Hercules* (2 Dod. 363) was that of a vessel which had been captured at Barbadoes by the captain of a king's ship, who, having returned the ship's papers, intimated to the master that he had better follow him to Antigua with his vessel. The captain of the king's ship took bodily possession of the vessel so accompanying him, on the following day, and it was decided that the seizure made at Barbadoes was continued throughout, and that the assumption of possession on the second day was not to be considered a fresh seizure, the vessel never having been set at liberty.

It is not essential, to constitute a capture such as to give occasion to recapture under the prize act, that the enemy should have taken actual possession. *The Edward and Mary* (3 Rob. 306) was the case of a vessel which a French lugger, declaring herself a French privateer, had ordered to lie to; but, owing to the boisterous state of the weather, had not sent a man on board her. Lord Stowell said, "I can by no means agree to what has been advanced in argument, that it was on this account no capture. The sending of a prize master on board is a very natural overt act of possession, but by no means essential to constitute a capture. If the merchantman was obliged to lie to, and obey the direction of the French lugger, and await her further orders, she was completely under the dominion of the enemy; there was no ability to resist, and no prospect of escape. There have been many instances of capture where no man has been put on board, as in ships driven on shore and into port. I remember particularly a famous case of a small British vessel armed with two swivels, which took a French privateer row-

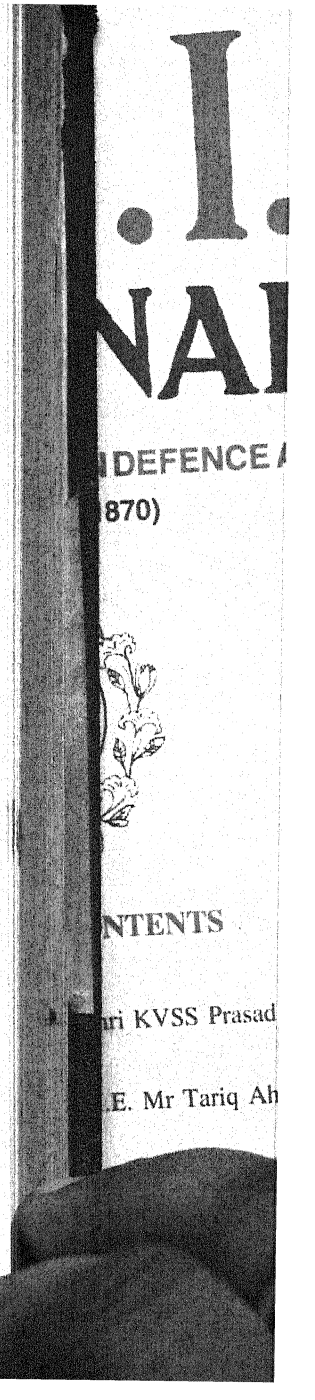
upon mutual mistake, and without any hostile intent or want of reasonable care, no wrong is done by either for which the other can justly claim a recompence, whatever may be the extent of the calamity inflicted. But if the attack be wanton, or from gross negligence, the party who is in fault is bound to make the most ample remuneration. (*The Marianna Flora*, 3 Mason, 116.)

Captures must be made by only commissionated vessels. *The Charlotte* (5 Rob. 280) was a claim by a king's ship in virtue of a seizure made by a hired armed revenue cutter, said to have been placed under the command of *The Euridice* man-of-war, and to be considered as a tender attached to that vessel. "In order to support that averment," said Lord Stowell, "it must be shown, either that there has been some express designation of her in that character by the orders of the Admiralty, or that there has been a constant employment and occupation in a manner peculiar to tenders, equivalent to an express designation, and sufficient to impress that character upon her. The former species of proof would undoubtedly be most desirable." In the case of *The Melomane* (Ib. 50), a capture by a cutter, fitted out by the captain of a man-of-war as a tender, commanded by a midshipman, and manned from his ship, but without a commission or authority from the Admiralty, Lord Stowell said, "It is not to be maintained that an officer, by putting his men on board, can constitute a ship to be part of the navy of Great Britain. Such a character is not to be impressed without the intervention of some public authority. If the contrary could be held, this must follow, that an officer of a large ship might

form out of these tenders as many ships of war as he pleased; he might compose a fleet. Whatever may have been the case in remote stations, where the principal persons in command must necessarily be entrusted with a greater latitude of discretion, at home, where an officer has it in his power instantly to refer to the Admiralty, the case is very different." In such cases, the prize is condemned as droits of the Admiralty, unless the commission so granted by the commander is afterwards confirmed by the Admiralty. (See also *The Charlotte*, 1 Dod. 220.) In the same case, however, in reference to boats belonging to men-of-war employed in effecting a capture, Lord Stowell said, "The court would certainly be disposed to extend, as far as it could, with propriety, to ships of war, the benefit of captures made by their boats acting distinctly in that capacity. There must be situations in which the capture could not be made otherwise; and many considerations of convenience require that they should be allowed to take, in whatever manner their judgment may deem expedient, according to the circumstances of the case, either by their whole force, or by a part detached on that particular service. The court would therefore not be disposed to narrow the legal effect of the operation of their boat's crew." (See also *The Donna Barbara*, 2 Haggard, 373.)

The restitution, by consent, of a prize does not bar a second seizure by other parties, either on the same or different evidence; but whoever ventures on a second seizure must make it under the peril of costs and damages. (*The Mercurius*, 1 Rob. 80; *The Woodbridge*, 1 Haggard, 74.)

A ship, though herself incapable of going out upon



a cruize, may make an effectual capture by her boats. "It is not to be said that, because the ship was incapable of going out on a cruize, therefore she could not make a seizure in port. She had arms which she could stretch out for such a purpose; she had her boats, which might be employed on a service of this kind. Is the court in every case to enter upon a consideration of the exact state and condition of the ship by which a seizure is effected? Suppose a vessel is in dock undergoing repairs, that circumstance would not suspend the right of the officer in command of her to act by himself and men in boats. The seizure may be legally effected by means of boats, or indeed without them, by a mere summons to the parties." (*The Charlotte*, 1 Dod. 220.)

A convoying ship may make a prize as well as any other of her Majesty's ships, provided the capture can be effected without deserting the care of the convoy. "The first and great object of the attention of an officer appointed to a service of this kind is the care of his convoy. He is not at liberty to desert it for the purpose of acquiring any advantage to himself, nor is he to volunteer any attack upon the enemy, if it takes him away from his first great duty. But as far as it is consistent with that duty, he may pursue his own interest and may attack and annoy the enemy in any way that may appear to him to be advantageous. He may capture the ships and goods of the enemy, provided he does not withdraw himself from the duty of protecting the vessels placed under his care, and may take the benefit of the prizes which he may have the good fortune to make. There is no pretence for saying that a convoying ship may not legally and effectually

make a prize as well as any other of his Majesty's ship's; nor is there more objection in the case of a convoying ship to constructive than to actual capture. A convoying ship is no more disabled from rendering assistance to others than from making an actual capture herself. The service on which she is employed makes no disqualification in either case, supposing only that the capture can be effected without any breach of the principal duty—the care of the convoy." (*The Galen*, Dodson, 429, 440.)

Where, in a capture, there is wrong doing, the actual captor, as the actual wrong doer, is the only person responsible to the Court of Admiralty for such injuries of seizure. In the case of *The Mentor*, an American ship, destroyed by her Majesty's ships the *The Centurion* and *Vulture*, part of Admiral Digby's squadron, cruising off the Delaware, in 1783, after the cessation of hostilities, but before that fact had come to the knowledge of either of the parties, and in which an after-suit was, in 1799, brought for damages against Admiral Digby, Lord Stowell said (1 Rob. 180), "It is an entire novelty in a prize cause to call to adjudication, not the immediate alleged wrong-doer, but a person who was neither present at nor cognizant of the transaction, and who is to be affected in responsibility merely on this ground, that the person alleged to have done the injury was acting under his general authority; for as to particular orders applying to this transaction, it is not pretended that any were given or could be given; he was only the admiral on the general station, and the ships which committed the alleged outrage were under his general command, but at a great distance from him. This is the first time that the attempt has been

made in a prize cause to pass over the person from whom the alleged injury has been received, and to fix it on another person, on the ground of a remote and consequential responsibility. The actual wrong doer is the man to answer in judgment; to him responsibility is attached in this court. He may have other persons responsible over to him, and that responsibility may be enforced. As for instance, if a captain made a wrong seizure, under the express orders of an admiral, that admiral may be made responsible in the damages occasioned to the captain by that improper act; but it is the constant practice of this court to have the actual wrong doer the party before the court, and every man must see the propriety of that practice; because if the court was once to open the door to complaints founded on a remote and consequential responsibility, where is it to stop? If a monition is to go against the admiral, for not issuing his revocatory orders, a monition might, in like manner, go against the Lords of the Admiralty for a similar neglect, or against the secretary for not issuing similar directions to the Lords of the Admiralty; and these persons might be made parties in a prize cause, and called upon to proceed to adjudication. If the legal responsibility is to be shifted from the actual captor, to whom is the claimant to look? Where is he to find the responsibility in the chain of persons who may be somehow or other involved in the different stages of the transaction? Where is he to find the wrong doer, if you once take off that character from the person who immediately commits the injury? Where is he to resort, if you take from him that easy and direct resort, with which, in the present understanding of the the law, he is provided? I am most clearly, on this

ground, of opinion, that Admiral Digby alone cannot be compelled to proceed to adjudication under this monition. The loss which the claimant has sustained is extremely to be lamented, but I cannot give relief on mere grounds of humanity; humanity is only the second virtue of courts; justice is unquestionably the first; and justice would be grossly violated by providing relief for one innocent man, at the expense of another, who is not legally subject thereto." (See also *The Faderlandt*, 5 Rob. 123.)

In cases of illegal capture, vindictive damages are not usually given, unless where the misconduct has been very gross, and left destitute of all apology. Great indulgence is allowed to errors, and even improprieties of captors, where they do not appear to have acted with malignity and cruelty. (*The Lively and cargo.* 1 Gall. 29; *The Anne*, 3 Wheat. 435; *The George*, 1 Mason, 24.) If a captor destroys a ship of an enemy protected by the licence of his own government, he or his government is responsible for the loss occasioned by such destruction. (*The Felicity*, 2 Dod. 381; *The Actæon*, Ib. 52); but when the captor acts *bonâ fide* in pursuance of his rights, in an ignorance, honest and invincible on his part, of a foreign fact not governed by his own domestic law, but dependent on transactions with which he is unavoidably unacquainted till actually communicated to him, he will be protected by the court. (*The John*, Ib. 339.)

The rule that a captor takes *cum onere* must be understood to apply, where the *onus* is immediately and visibly incumbent. A captor who takes the cargo of an enemy on board the ship of a friend, takes it liable to the freight due to the owner of the ship,

because the owner has the cargo in his possession, subject to that demand by the general law, independently of all contract. But this rule does not apply to mere rights of action, such as bottomry bonds, liens, &c., which are claims which no Admiralty court can examine with effect; the captor has no access whatever to the original private understanding of the parties in forming such contracts, and it is therefore unfit that he should be affected by them. *The Tobago* (5 Rob. 218); *The Diana* (Ib. 67); *The Ann Green* (1 Gall. 293); *The Twilling Riget* (5 Rob. 82); *The Francis* (8 Cranch, 418); *The Constancia Harlessen*, (1 Edw. 232); *The Mariana* (6 Rob. 24), are cases in which questions relating to freight, liens, &c., on prizes, have been decided on a similar principle.

Captors must proceed to adjudication with all practicable speed. In *The Madonna Del Burso* (4 Rob. 169), demurrage, damage and compensation were pronounced due on the ground of great and unnecessary delay in the proceeding by the captor to adjudication. "Unless the captor," said Lord Stowell, "can exculpate himself with respect to delay in this matter, he is guilty of no inconsiderable breach of his duty. It would be highly injurious to the commerce of other countries, and disgraceful to the jurisprudence of our own, if any persons, commissioned or non-commissioned, could lay their hands on valuable foreign ships and cargos without bringing such act to judicial notice with prompitude." (See also *The San Juan Batista* and *The Purissima Concepcion*, 5 Rob. 33; *The Corier Maritimo*, 1 Rob. 287; *The Susanna*, 6 Rob. 51.) It is the duty of the captor immediately to commit the prize to the care of a competent prize master

and crew; not because the original crew, when left on board in the case of a seizure of the vessel of a citizen or neutral, are released from their duty without the assent of the master, but from the want of a right to subject the captured crew to the authority of the captor's officer. (*The Eleanor*, 2 Wheat. 345.)

The captor must send his prize to some convenient port for adjudication. "The Prize Act," said Lord Stowell, "undoubtedly gives the captor some latitude in this subject, but it must be a place where the captor can get advice, and still more where the claimant can learn in what manner to proceed, or where to resort for justice. The captor is certainly not justified in selecting any port that he pleases. It must be a convenient port, and in that consideration the convenience of the claimant, in proceeding to adjudication, is among one of the first things to which the attention of the captor ought to be directed. (*Wilhelmsberg*, 5 Rob. 143; *The Lively and cargo*, 1 Gall. 318; *The Washington*, 6 Rob. 275.) Where a captor is unable to bring in enemy's property clearly ascertained to be such, his duty is to destroy it; but where the character of the property is doubtful, and it is impossible to subject it to legal adjudication, the safe and proper course is to dismiss it. (*The Felicity, ubi supra.*) Captors have no right to convert property, till it has been brought to legal adjudication; they are not even to break bulk; they can have no justification for converting such property, except in cases of physical necessity, which overpowers all ordinary rules, as where the case arises in a distant part of the world, and it can be shown that the goods were perishing. (*L'Eole*, 6 Rob. 220.) It is the duty of captors, immediately upon arrival in port, to deliver

upon oath into the registry of the court all papers found on board the captured ship (*The Diana*, 2 Gall. 95); and also to bring in the prize crew, or at least the master and principal officers, with the prize, for adjudication. (*The Bothnea and The Janstoff*, 2 Gall. 88.)

The right to capture enemy's property on board a neutral ship has been much contested by particular nations, whose interests it strongly opposed. In 1780, the Empress of Russia proclaimed the principles of the Baltic code of neutrality, which she declared she would maintain by force of arms; one of the articles of that code being that all effects belonging to the subjects of belligerent powers should be looked upon as free on board of neutral ships, except only such as were contraband. Sweden, Denmark, Prussia, Germany Holland, France, Spain, Portugal, and Naples, and also the United States, acceded to the Russian principle of neutrality; but, in consequence of the more effective resistance of Great Britain, the conventional term of neutrality thus attempted to be set up was abandoned in 1793, as not sanctioned by the law of nations, except in those cases where a positive compact had been made by treaty. In 1801, a second attempt was made by the Baltic powers to enforce the doctrines of armed neutrality asserted in 1780, but the attempt was again defeated by the undoubted naval superiority of Great Britain and Russia, by a convention with England, in June, 1801, expressly agreeing that enemy's property was not to be protected on board of neutral ships. The entire question of *free ships free goods* is thus ably reviewed by Mr. Wheaton, in his Elements of International Law, 162—183:—

"Although by the general usage of nations, inde-

pendently of treaty stipulations, the goods of an enemy found on board the ships of a friend are liable to capture and condemnation; yet the converse rule, which subjects to confiscation the goods of a friend on board the vessels of an enemy is manifestly contrary to reason and justice. It may, indeed, afford, as Grotius has stated, a presumption that the goods are enemy's property, but it is such a presumption as will readily yield to contrary proof, and not of that class of presumptions which the civilians call *presumptiones juris et de jure*, and which are conclusive upon the party."

"But, however unreasonable and unjust this maxim may be, it has been incorporated into the prize code of certain nations, and enforced by them at different periods. Thus by the French ordinances of 1538, 1543, and 1584, the goods of a friend laden on board the ships of an enemy are declared good and lawful prize. The contrary was provided by the subsequent declaration in 1650; but by the marine ordinance of Louis XIV. of 1681, the former rule was again established. Valin and Pothier (*De Proprieté*, No. 96) are able to find no better argument in support of this rule, than that those who lade their goods on board an enemy's vessels thereby favour the commerce of the enemy, and by this act are considered in law as submitting themselves to abide the fate of the vessel; and Valin asks (lib. 3, tit. 9, *Des Prises*, art. 7), 'How can it be that the goods of friends and allies found in an enemy's ship should not be liable to confiscation, whilst even those of subjects are liable to it; to which Pothier himself furnishes the proper answer—that in respect to goods, the property of the King's subjects, in lading them on board an enemy's vessels they con-

travene the law which interdicts to them all commercial intercourse with the enemy, and deserve to lose their goods for this violation of the law.' The fallacy of the argument by which this rule is attempted to be supported consists in assuming what requires to be proved, that by the act of lading his goods on board an enemy's vessel the neutral submits himself to abide the fate of the vessel; for it cannot be pretended that the goods are subjected to capture and confiscation *ex re*, since their character of neutral property exempts them from this liability. Nor can it be shown that they are liable, *ex delicto*, unless it be first proved that the act of lading them on board is an offence against the law of nations. It is, therefore, with reason that Bynkershoeck concludes that this rule, where merely established by the prize ordinances of a belligerent power, cannot be defended on sound principles. Where, indeed, it is made by special compact the equivalent for the converse maxim, that free ships make free goods, this relaxation of belligerent pretensions may be fairly coupled with a correspondent concession by the neutral, that enemy ships should make enemy goods. These two maxims have been, in fact, commonly thus coupled in the various treaties on this subject, with a view to simplify the judicial inquiries into the proprietary interest of the ship and cargo, by resolving them into the mere question of the national character of the ship. The two maxims are not, however, inseparable. The primitive law, independently of international compact, rests on the simple principle that war gives a right to capture the goods of an enemy, but gives no right to capture the goods of a friend. The right to capture an enemy's property has no limit but that of the place where the goods are found, which, if neutral,

will protect them from capture. We have already seen that a neutral vessel on the high seas is not such a place. The exemption of neutral property from capture has no other exceptions than those arising from the carrying of contraband, breach of blockade, and other analogous cases, where the conduct of the neutral gives to the belligerent a right to treat his property as enemy property. The neutral flag constitutes no protection to an enemy's property, and the belligerent flag communicates no hostile character to neutral property. States have changed this simple and natural principle of the law of nations, by mutual compact, in whole or in part, according as they believed it to be for their interest; but the one maxim, that *free ships make free goods*, does not necessarily imply the converse proposition, that *enemy ships make enemy goods*. The stipulation that neutral bottoms shall make neutral goods, is a concession made by the belligerent to the neutral, and gives to the neutral flag a capacity not given to it by the primitive law of nations. On the other hand, the stipulation subjecting neutral property found in the vessel of an enemy to confiscation as prize of war, is a concession made by the neutral to the belligerent, and takes from the neutral a privilege he possessed under the pre-existing law of nations; but neither reason nor usage render the two concessions so indissoluble that the one cannot exist without the other. It was upon these grounds that the supreme court of the United States determined that the treaty of 1795, between them and Spain, which stipulated that free ships should make free goods, did not necessarily imply the converse proposition, that enemy ships should make enemy goods, the treaty being silent as to the latter;

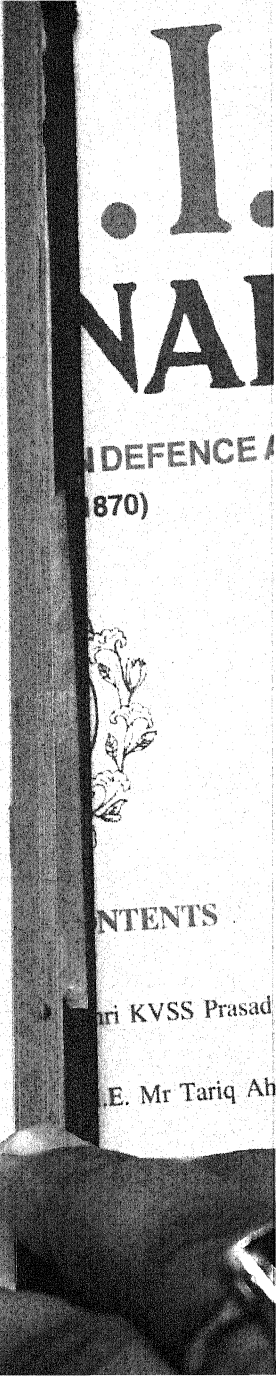
and that, consequently, the goods of a Spanish subject found on board the vessel of an enemy of the United States were not liable to confiscation as prize of war; and although it was alleged that the prize law of Spain would subject the property of an American citizen to condemnation when found on board the vessels of her enemy, the court refused to condemn Spanish property found on board a vessel of their enemy upon the principle of reciprocity, because the American government had not manifested its will to retaliate upon Spain; and until this will was manifested by some legislative act, the court was bound by the general law of nations constituting a part of the law of the land." (*The Nereide*, 9 Cranch, 388.)

The conventional law in respect to the rule now in question has fluctuated at different periods, according to the fluctuating policy and interests of the different maritime states of Europe. It has been much more flexible than the consuetudinary law; but there is a great preponderance of modern treaties in favour of the maxim, *free ships free goods*, sometimes, but not always, connected with the correlative maxim, *enemy ship enemy goods;* so that it may be said that, for two centuries past, there has been a constant tendency to establish by compact the principle that the neutrality of the ship should exempt the cargo, even if enemy's property, from capture and confiscation as prize of war.

During the war which commenced between the United States and Great Britain in 1812, the prize courts of the former uniformly enforced the generally acknowledged rule of international law, that enemy's goods in neutral vessels are liable to capture and con-

fiscation, except as to such powers with whom the American government had stipulated by subsisting treaties the contrary rule, that free ships should make free goods. In their recent negotiations with the newly established republics of South America, the United States proposed the establishment of the principle of free ships free goods as between all the powers of the North and South American continents. It was declared that the rule of public law—that the property of an enemy is liable to capture in the vessel of a friend—has no foundation in natural right, and, though it be the established usage of nations, it rests entirely on the abuse of force. No neutral nation, it was said, was bound to submit to the usage; and though the neutral may have yielded at one time to the practice, it did not follow that the right to vindicate by force the security of the neutral flag was thereby permanently sacrificed. But the neutral claim to cover enemy's property was conceded to be subject to this qualification, that a belligerent may justly refuse to neutrals the benefit of this principle, unless admitted also by their enemy for the protection of the same neutral flag.

Mr. Manning, in his Commentaries on the Law of Nations (pp. 203, 244, 280), emphatically vindicates the belligerent right against the doctrine of the Baltic powers, founding his argument on the authority of the Consolato del Mare, and on that of the most eminent European jurists who have written upon the law of Europe during the last two centuries, giving however, as the general result of his investigations, that there is nothing like system or consistency of principle in the



conventional law of Europe on the subject, the belligerent rule having been alternately adopted and rejected, and qualified with infinite vicissitude, and so as to leave the rule on a general and settled principle of international law, when not disturbed by positive stipulations, in full force.

The right, however, thus granted to captors to seize all ships of the enemy does not bar the crown from any further exercise of its power with respect to seizure, for the crown can still grant exemptions or protections as it sees fit. In the case of *The Elsebe* the question was, whether the crown was empowered to issue an order for the release of several vessels, being part of a Swedish convoy. In that case the claim of the captors rested wholly on the order in council, the proclamation, and the prize act. Lord Stowell said, "The right contended for is a right to seize and bring to an adjudication all ships of the enemy. Does the right to seize thus generally given alone bind the crown so far as to bar it from any further exercise of its power with respect to seizure? Certainly not; for after that right is given to seize all ships of the enemy, the crown can exempt if it sees fit. The crown, which declares general hostilities, can limit their operation. * * * All principles of law, all forms of law, all considerations of public policy, concur to support the right of release prior to condemnation." (5 Rob. 173.)

If a British subject during war, without any commission from the crown, capture an enemy's ship, the prize is not the property of the captor, but is one of the droits of the Admiralty within the terms of the order in council of Charles II., which declares, "that all enemies' ships and goods, casually met at sea and

seized by any vessel not commissionated, do belong to the Lord High Admiral." In order to encourage merchants and others to fit out privateers or armed ships in time of war for reprisals against the enemy, the Lords of the Admiralty are from time to time empowered by parliament to grant commissions to the owners of such ships, and the prizes captured are divided between the owners and the captain and crew of the privateers.

Formerly, the crown used to reserve to itself a share of all prizes captured by privateers; but by the last prize act (55 Geo. 3, c. 160, s. 17), which expired with the war, the entire proceeds of all prizes and captures made by privateers were conferred upon the owners, without reserving any share to the crown. (5 Rob. 173.)

"The same law of nations," said Dr. Croke, "which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted among all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favour and protection. They are considered, not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species."

Fishing vessels are good prize equally with others. In condemning *The Young Jacob*, Johanna, a small Dutch fishing vessel, Lord Stowell said (1 Rob. 20): "In former wars it has not been usual to make captures of these small fishing vessels, but this rule was a

rule of comity[1] only and not of legal decision: it has prevailed from views of mutual accommodation between neighbouring countries and from tenderness to a poor and industrious order of people. In the present war, there has, I presume, been sufficient reason for changing this mode of treatment; and as they are brought before me for my judgment, they must be referred to the general principles of this court, falling under the character and description of ships constantly and exclusively employed in the enemy's trade."

Property at sea acquired by capitulation does not seem to be in precisely the same predicament as property upon land. From the case of the ships taken at Genoa (4 Rob. 388), it appears that a permission to the conquered of withdrawing themselves, their money, merchandizes, moveables or effects, by sea or land, does not necessarily or usually imply a permission to withdraw property afloat.

[1] It is an indulgence of ancient date. (See Order of Henry 4, 1403 and 1406; and Rymer, Fœdera, viii. 336 and 451.) The French Ordonnance of 1543, gave the admiral a power of forming fishing truces, *trêves pêcheresses*, with the enemy during hostilities, and of granting passports to individuals to continue their fishing trade unmolested; this practice prevailed so late as the reign of Louis XIV. It afterwards fell into disuse, owing, says Valin (liv. v. tit. 1), "to the ill faith with which they were observed by the enemies of France;" but the indulgence was revived under an *Arrêt du Conseil du Roi*, 6th Nov. 1780, which forbad the French cruizers to disturb in any manner English fishermen with offensive arms, &c., unless they could be proved "to have made signals for the purpose of furnishing intelligence to the enemy."

JOINT CAPTURE.

Capture is of two kinds, capture *de facto* and capture by construction or joint capture. "The act of parliament and the proclamation," said Lord Stowell, in *The Vryheid* (2 Rob. 21), "give the benefit of prize 'to the takers,' by which term are naturally to be understood those who *actually take possession*, or those affording an actual contribution of endeavour to that event: either of these persons is naturally included under the denomination of *takers;* but the courts of law have extended the term *takers* to another description of persons—to those who, not having contributed actual service, are still supposed to have rendered a constructive assistance, either by conveying encouragement to the captor or intimidation to the enemy. Capture has therefore been divided into capture *de facto* and capture *by construction.*

"Capture by construction must remain on the terms the law has already recognized, and not a new unauthorized construction; for as the word has already travelled a considerable way beyond the meaning of the act of parliament, the disposition of the court will be, not to extend it still further, but to narrow it and bring it nearer to the terms of the act than has been done in some former cases. The case of *The Mars* is a strong authority on this point, in which the claim of joint capture was disallowed to ships not in company, but stationed at different outlets to catch the enemy, who were known to be under the necessity of passing through one of them. In all cases the *onus probandi* lies on those setting up the construction, because they

are not persons strictly within the words of the act, but let in only by the interpretation of those acting under a competent authority to interpret it. It lies with the claimants in joint capture, therefore, either to allege some cases in which their construction has been admitted in former instances, or to show some principle in their favour so clearly recognized and established as to have become almost a first principle in cases of this nature.

"The being in sight generally, and with some few exceptions, has been so often held to be sufficient to entitle parties to be admitted joint captors, that where that fact is alleged we do not call for particular cases to authorize the claim; but where that circumstance is wanting, it is incumbent on the party to make out his claim by an appeal to decided cases, or at least to principles which are fairly to be extracted from these cases."

Joint capture is not recognized upon the ground of common enterprize alone. *The Vestal* frigate claimed to share in the proceeds of the capture of the Dutch fleet by Capt. Trollop in October, 1798, on the plea that, although not taking part in or even in sight of the engagement, she was one of the ships under the captor's command on that station, and was only absent on the occasion in consequence of having been dispatched by him on a special mission. Lord Stowell, in rejecting the claim, said,—"There are no cases cited as being directly in point; but the case of *The Senor San Josef* (House of Lords, May 4, 1784) has been alluded to. That is a case which I perfectly recollect, having been concerned in arguing it; but it was in its principal circumstances entirely different

from the present case. That was a case of two vessels detached from the fleet under the command of Admiral Pigot in the West Indies to chase two strange ships appearing in sight, the fleet bearing up all the time as fast as possible to support them. The chasing vessels took the two ships first appearing, and also a third, on which the dispute arose. There was much contrariety of evidence whether the fleet (which was continuing to sail in the same direction) was not up and in sight, and the chief doubt arose owing to the night coming on; for if it had been day, the fleet would clearly have been in sight, and it was, at all events, well known to be at hand and ready to have given any support that might be wanting. Under these circumstances the Court of Appeal affirmed the sentence of the court below, pronouncing for joint capture; and in that sentence it is, I believe, true, as it has been stated by the counsel, that some mention was made of the words *joint enterprize*. But taking the case altogether, it can by no means be said to go the length of the present claim.

"As far as cases go then, there is an entire failure of authority on the part of *The Vestal;* but the usage of the navy has been resorted to, and a case has been cited of *The Audacious,* one of the fleet under the command of Lord Howe, being permitted to share in the victory of the first of June, 1794. It is admitted, and it is certainly true, that the practice of the navy, in opposition to the words of the act of parliament or a proclamation, or to the established practice of law, cannot weigh or be of any authority. At the same time the court would be extremely unwilling to break in on any settled and received notions of the navy, or

to disturb a practice generally prevailing among themselves. But the case cited is different from the present. *The Audacious* had actually engaged the enemy's fleet, and had separated only in chase of one of their ships. *The Canada*, another case which has been mentioned, chased from the fleet by signal on the prize coming in sight; and *The Lowestoff*, which is another case stated to have happened in the Mediterranean, was not detached from the Mediterranean fleet till after the chase had actually begun. These circumstances, therefore, materially distinguish these cases from the present, and I am at liberty to say that no case in point or authority has been produced. Is there then any admitted principle? The gentlemen have resorted to the general principle of common enterprize, and it has been contended that, where ships are associated in a common enterprize, that circumstance is sufficient to entitle them to share equally and alike in the prizes that are made; but certainly this cannot be maintained to the full extent of these terms. Many cases might be stated in which ships so associated would not share. Suppose a case that ships going out on the same enterprize, and using all their endeavours to effectuate their purpose, should be separated by storm or otherwise: who would contend that they should share in each other's captures? There is no case in which such persons have been allowed to share after separation, being not in sight at the time of chasing. It cannot be laid down to that extent, and indeed it would be extremely incommodious that it should. Nothing is more difficult than to say precisely where a common enterprize begins. In a more enlarged sense, the whole navy of England may be

said to be contributing in the joint enterprize of annoying the enemy. In particular expeditions every service has its divisions and sub-divisions. Operations are to be begun and conducted at different places. In the attack of an island there may be different ports and different fortresses, and different ships of the enemy lying before them. It may be necessary to make the attack on the opposite side of the island, or to associate other neighbouring islands as objects of the same attack. The difficulty is, to say where the joint enterprize actually begins. Again, is it every remote contribution, given with intention or without intention, that can be sufficient? I apprehend that is not to be maintained. An actual service may be done without intention, or there may be a general intention to assist, and yet no actual assistance given. Can any body say that a mere intention to assist, without actual assistance, though acted upon with the most prompt activity, would in all cases be sufficient? If persons under such claims could share, there would be no end to dispute. No captor would know what he was about, whether in every prize he made there might not be some one fifty leagues distant working very hard to come up, and even acting under the authority of the Admiralty to co-operate with him. In serving his country every captor would be left in uncertainty whether some person whom he never saw, and whom the enemy never saw, might not be entitled to share with him in the rewards of his labour. The great intent of prize is to stimulate the present contest, and to encourage men to encounter present fatigue and present danger; an effect which would be infinitely weakened, if it were known that there might be those not present and

not concerned in the danger who would entitle themselves to share. What is the true criterion in these cases? The being in sight, or seeking the enemy's fleet accidentally a day or two before, will not be sufficient; it must be at the commencement of the engagement, either in the act of chasing, or in preparation for chase, or afterwards during its continuance. If a ship was detached in sight of the enemy, and under preparation for chase, I should have no hesitation in saying that she ought to share; but if she was sent away after the enemy had been descried, but before any preparations for chase, or any hostile movements had taken place, I think it would be otherwise. There must be some actual contribution of endeavour as well as a general intention." (*The Vryheid*, 2 Rob. 21.)

When *The Odin* was captured off St. Helena by the boat of H. M. S. *Trusty*, a claim of joint capture was made on the part of *The Royal Admiral*, a private ship of war, on the ground that her boat, which had been sent out from the harbour of St. Helena to assist in the capture, was in sight when the capture was effected by the boats of *The Trusty*. Lord Stowell said, "I know of no case that would sustain such a claim. The principle of constructive assistance has been altogether thought to have been carried somewhat far; and the later inclination of courts of justice has been rather to restrain than extend the rule. Between private ships of war and king's ships, the rule of law has been always held more strictly, and it has not been the doctrine of the Admiralty to raise constructive assistance so easily between them as between king's ships. If the competition had been between two king's ships, it would, in my opinion, be

highly questionable whether a boat so sent out could support a claim to share on the mere principle of being in sight. There is, I think, a very solid ground of distinction between the claims of a boat in the different cases of an actual and a constructive capture. Where a boat actually takes, the ship to which it belongs has done, by means of this boat, all that it could have done by the direct use of its own force. In the case of mere constructive capture, the construction which is laid upon the supposed intimidation of the enemy, and the encouragement of a friend, from a ship of war being seen, or within sight of a capture, applies very weakly to the case of a boat—an object that attracts little notice upon the water, and whose character, even if discerned by either of the other parties, may be totally unknown to both. More unreasonable still would this be upon actual captors, if the constructive co-operation of such an object would give an interest to the entire ship to which it belonged. Where a ship is in sight, she is conceived to co-operate in the proportion of her force. But what room is there for such a presumption where she co-operates only by the force of her boat? I am of opinion, both on principle and authority, that where no antecedent agreement is proved to have taken place, a vessel lying in harbour cannot be entitled to share in a capture made out of the harbour, by the circumstance of her boat being merely in sight." (*The Odin*, 4 Rob. 318; see also *La Belle Coquette*, 1 Dod. 18; *The Nancy*, 4 Rob. 327; *The Vryheid*, 2 Rob. 16; *The Niemen*, 1 Dod. 16.)

The distinction between public and private ships of war with reference to claims of joint capture was laid

down by Lord Stowell in the case of *The Amitié* (6 Rob. 261). The claim was made on the part of two privateers, *The Larh* and *General Coote*, to share in the prize made by *The Gannet*, a man-of-war of 16 guns. "The rule of law on this subject, which has long been established in this court and the Court of Appeals in various cases, is, that it must be shown on the part of the privateers that they were constructively assisting. The being in sight is not sufficient with respect to them to raise the presumption of co-operation in the capture. They clothe themselves with commissions of war from views of private advantage only. They are not bound to put their commissions in use on every discovery of the enemy; and therefore the law does not presume in their favour, from the mere circumstance of being in sight, that they were there with a design of contributing assistance and engaging in the contest. There must be the *animus capiendi* demonstrated by some overt act; by some variation of conduct, which would not have taken place but with reference to that particular object and if the intention of acting against the enemy had not been effectually entertained."

Again, in *La Flore* (5 Rob. 268) Lord Stowell said, in reference to king's ships, "They are under a constant obligation to attack the enemy wherever seen; a neglect of duty is not to be presumed, and therefore, from the mere circumstance of being in sight, a presumption is sufficiently raised that they are there *animo capiendi*. In the case of privateers, the law does not give them the benefit of the same presumption. Ships of this description go out very much on speculation of private advantage, which, combined

with other considerations of public policy, are undoubtedly very allowable, but which do not lead to the same inference as that which the law constructs on the known duty imposed on king's ships. A privateer is under no obligation to attack all she meets, but acts altogether on views of private advantage. She may not be disposed to engage in every contest; and, therefore, the presumption does not arise in any instance that she is present *animo capiendi*. *A contrary route*, if proved, would defeat the claim even of a king's ship (see also *The Drie Gebroeders*, 5 Rob. 341); but if nothing appears, on one side or the other, as to that fact, the mere presence would, I think, be sufficient to entitle the king's ship to the character of a constructive joint captor." *The Fadrelandt* (5 Rob. 120) established the principle that in a claim of joint capture grounded on the being in sight, it is necessary that the claiming vessel should have been seen by the actual captor, and also by the captured vessel; one of which facts must be established by evidence other than the claiming vessel, and the other by implication and necessary inference. When two vessels are associated for the purpose of effecting a capture, the continuance of the chase is sufficient to give the right of joint capture, and sight is, under such circumstances, unnecessary. (*L'Etoile*, 2 Dod. 106.) So ships will be entitled to share as joint captors which have been seen to be in chase of the prize during the day, and have continued the pursuit in a proper direction, the prize itself also continuing the same course, although they have been prevented from seeing the act of capture by the darkness of the night (*The Union*, 1 Dod. 346), or by the accidental pre-

vention of sight by an intervening fog or headland at the moment of surrender; because the impulse and impression in the mind of the enemy who is to be intimidated, or of the friend who is to be encouraged, continue in full force, and thus support the principle on which the doctrine of constructive assistance is built. (*The Fadrelandt, ubi sup.; The Forsigheid,* 3 Rob. 316.)

With regard to the position of revenue cutters as to joint capture, "it is a known rule of law," said Lord Stowell, in *The Bellona* (1 Edw. 64), "that the mere fact of being in sight would be sufficient to entitle a king's ship, because, in ships fitted out by the state for the express purpose of cruising against the enemy, the *animus capiendi* is always presumed; but this presumption does not extend to privateers. In the one case the duty is obligatory; in the other, where private individuals make captures at their own expense, they are engaged in a mere commercial speculation to be carried into effect by military means, but dependent upon their own will in the particular acts and exercises of their authority; although they are authorized, they are not commanded to capture; it is a matter in which they are left to their own discretion. But these vessels employed in the service of the revenue are a class of ships of an anomalous kind, partaking in some degree of both characters; they belong to the government, and are maintained at the public expense, but not for the purpose of making captures from the enemy. On the other hand, they have commissions of war, but these are private commissions, which impose no peculiar duties upon them; they are not bound to attack and pursue the enemy

more than other private ships of war, and they are likewise unfavourably distinguished in this respect, that the advantages of capture are not held out to them, the interest of all captures made by them being reserved to the crown. Primarily, their duty is to protect the revenue, and the capture of the enemy's vessels is engrafted upon their original character. All they derive from these commissions is, an authority to attack the enemy, in addition to other authorities that belong to their original and proper employment; on principle, therefore, they can only be considered as private ships of war. They are under no injunction to cruize against the enemy, and are employed generally for fiscal purposes; it is true that there is the addition of a military commission in time of war, but that does not designate them anew, it merely puts them on a footing with other private ships of war."

In the case of *The Santa Brigada* (3 Rob. 52), the allegation was of joint capture on the part of a private ship of war asserted to have been in sight at the time of the capture of a valuable Spanish galleon by *The Triton* frigate, and to have put herself in motion in such a manner as might have been effectual in cutting off the retreat of the galleon into a Spanish port. Lord Stowell said, "The being in sight will not be sufficient; it would open a door to very frequent and practicable frauds if, by the mere act of hanging on upon his Majesty's ships to pick up the crumbs of the captures, small privateers should be held to entitle themselves to an interest in the prize which the king's ships took."

Nuestra Senora del Buen Consejo (3 Rob. 55, note)

was the case of a Spanish register ship of 800 tons and 26 guns (12-pounders), taken on the 29th of November, 1779, by *The Hussar*, Captain Salter. A claim of joint capture was given, and allowed, on the part of *The Resolution*, privateer of 16 six-pounders, Captain Sladen, whose gallantry and perseverance appeared highly meritorious in keeping the prize in chase from the 5th November till the 20th, having fought her several times, notwithstanding the disparity of force, and having kept constantly up with her, burning false lights, &c., during the night to attract the notice and assistance of some British cruizer.

The prize acts passed during the last war expressly reserved to the crown all captures made by revenue cutters. (See 55 Geo. 3, c. 160, s. 17; *The Robert*, 3 Rob. 194.)

Where one of two joint chasers has been ordered to pick up the boats of the other, and in consequence of the delay thereby occasioned has lost sight of the prize, she is not entitled to share with a third ship coming up and making the actual capture. "It is the first duty of the King's officers," said Lord Stowell, in *The Financier* (1 Dod. 67), "to obey the lawful commands of their superiors, and views of mere private advantage are of secondary consideration only, and must give way to the imperative requisitions of the public service."

The Guillaume Tell was the case of a claim by H. M. Ships *Culloden* and *Northumberland* to joint capture, as stationed at different points in support of the blockade of Malta in 1800, which was resisted on the ground that they had been unable to

take actual part in the capture in consequence of unfavourable weather. The claim however was admitted. "It has been objected," said Lord Stowell (1 Edw. 11), "that they had not the physical means of pursuing, because the state of the wind was such, that they could not quit the bay. Whether they would have pursued, if it had been physically possible, it is not necessary to inquire. In the case of chasing by a fleet, the *animus persequendi* in all is sufficiently sustained by the act of those particular ships which do pursue. It is I think highly probable that even if the wind had been fair, *The Culloden* and *Northumberland* would have remained, as some of the other ships off Valetta did, in a state of inactivity, reasonably judging from the precautions taken, and from the flashes of the guns, that a sufficient force had already gone upon the service. Therefore, unless it can be maintained, which it certainly cannot, that the whole of a squadron must in all cases pursue, and that the other ships which remained inactive off Valetta are not entitled to share, upon what principle are these two ships to be excluded? But it has been urged, that as the wind then was, ships of their burden could not have cleared the shoals so as to get out; and it comes therefore to a question of law, whether such an intervention of physical impossibilities will exclude a ship from being held part of a squadron associated for the express purpose of making the capture. There have been cases in which it has been determined that physical impossibilities of some permanence, and which could not be removed in time, would have such an effect; as, for instance, in the case of a ship lying in harbour totally unrigged, which has been held to be as much excluded as one totally unconscious

of the transaction, because by no possibility could that ship be enabled to co-operate in time. But I take it that in no case the mere intervention of a circumstance so extremely local and transitory as the accidental state of the wind, has been made a ground of exclusion. The interests of joint captors would be placed on a very precarious and uncertain footing indeed, if a doctrine were to be admitted which referred them to the legal operations of a casualty so variable in itself, and so little capable of being accurately estimated. It being proved in this case, that the whole fleet were acting with one common consent, upon a preconcerted plan for the capture of this prize, it was as much a chasing under orders from the officer in command, as if it had actually taken place in the open sea. It was a chasing by signal and in sight of these two ships, which even if they had not been incapacitated by the state of the wind, in all probability would not have thought it necessary or proper to join in the pursuit. The cases which have been cited were very different from this; *The Généreux* (Lords, 7th May, 1803) was captured upon the coast of Sicily, at the distance of 22 leagues from Malta by a part of the squadron which were sent to look out for her, while the rest kept their station off Valetta; there was no sight, and the utmost they could bring the case up to was, that a firing of guns was heard by one of the stationed ships. In the case of *The Mars* there was neither sight nor association, and in *The Trautmansdorf* (Lords, 1st August, 1795), there was the same effect of a want of association. Now in this case there was not only an actual sight, not only a perfect conusance of what was going forward, but

as complete and uniform and persevering an association in this particular object, as well as in the general objects of the blockade, as can be imagined. I am therefore of opinion, that *The Culloden* and *The Northumberland* are entitled to share, and that the same right will extend to the other ships which remained off Valetta, although they have not made themselves parties to this suit."

On the other hand a claim on behalf of H. M. S. *Leda*, sent forward to the coast of South America to obtain information before the expedition to Buenos Ayres had been finally resolved upon, and quitting the station before the armament arrived, but returning six days after the capture of that settlement, was held not entitled in virtue of antecedent or subsequent services. (*Buenos Ayres*, 1 Dod. 28.)

In the case of *The Robert* (3 Rob. 194), an attempt was made to establish joint capture, from the circumstance of the claiming vessel, *The Defence*, having been in sight from the mast-head of the captor. Lord Stowell said: "I am not aware of any one instance in which the court has pronounced for a joint capture, on being in sight only from the mast-head. I do not say that such a case would be entirely and absolutely out of the reach of the principle on which the being in sight is admitted to constitute an interest of joint capture; but this may be safely affirmed, that if the court was to pronounce for such a claim on such evidence, it would be in all respects a very extreme case indeed."

Upon the capture of the island of Trinidad, a question arose as to the right of H. M. S. *Alfred*, *Dictator*, *Bittern*, *Zephyr*, and *Pelican*, to share in the property taken upon land, and in the capture of

one vessel, and in the distribution of bounty, for the destruction of others. The claim depended on the evidence as to being in sight; and Admiral Harvey, who commanded the British squadron, had expressed an opinion that these vessels must have been in sight the evening before the enemy's ships were set on fire, and *The San Damaso* was taken. Lord Stowell said: "The grounds of this opinion appear to be perfectly rational and just, and, if supported on the part of the vessels themselves, they might have been very material. But the court is bound to expect, that the being in sight should be proved by some direct evidence applying to the fact, and not merely by opinion, formed upon the conjectures of any persons, however respectable they may be. It is said that they heard the explosion. But it is a common phrase, not more contemptible for being common, that hearing is not seeing. The explosion of such a body as a ship of war would be heard to a stupendous distance. It is a well-known fact, that, in the famous battle in the Downs, the explosion was heard in St. James's Park, and was made the foundation of a mathematical calculation by Sir William Petty, with respect to the velocity of the progress of sound. So, with regard to the conflagration, the atmosphere would be illuminated to a prodigious distance; but it would be ludicrous to say, that all who were within the reach of these appearances, produced by the fire, are to be taken in law as present at the occurrence itself."

In the case of *The El Rayo* (1 Dod. 42), a Spanish man-of-war, taken three days after the battle of Trafalgar, by H. M. S. *Donegal*, H. M. S. *Leviathan* was not admitted to share in the capture, *The Leviathan* being employed in taking care of other ships and prizes

captured in the battle, and her attention being also directed to the movements of *The Monarch*, another Spanish ship.

Actual intimidation alone, without co-operation and active assistance, will not establish a claim of joint capture. Upon the claim of certain East India ships employed to carry a number of troops to the Cape of Good Hope, to share in the capture of that possession in 1795, Lord Stowell said: "If they had been associated to act in conjunction with the fleet, and did so act, they might acquire an interest which, on proper application, would be sure to meet with due attention. The question for me to consider then will be, whether they have acquired that military character or not? Their pretensions have been put forward on several grounds. It is first said, that they were associated with the fleet. Mere association will not do; the plea must go farther, and show in what capacity they were associated, and that capacity must be directly military. Transports are associated with fleets and armies for various purposes connected with, or subservient to, the military uses of those fleets and armies. But if they are transports merely, and as such are employed simply in the transportation of men or stores, they do not rise above their proper mercantile character in consequence of such an employment; the employment must be that of an immediate application to the purposes of direct military operations, in which they are to take a part.

"It is next placed on the ground of intimidation; and it is said, that when the enemy is proved to have been intimidated, where it is not matter of inference, but of *actual proof*, the assistance arising from intimidation is not to be considered as constructive merely,

but an actual and effective co-operation. But I take that not to be quite correct; for an hundred instances might be mentioned in which actual intimidation might be produced, without any co-operation having been given. Suppose the case of a small frigate going to attack an enemy's vessel, and four or five large merchant ships, unconscious of the transaction, should appear in sight: they might be objects of terror to the enemy, but no one would say that such a terror would entitle them to share; though the fact of terror was ever so strongly proved, there would not be that co-operation nor that active assistance which the law requires, to entitle non-commissioned vessels to be considered as joint captors. What is the intimidation alleged? 'That the Dutch forces were about to make an attack on the British army, but on the appearance of these fourteen ships desisted.' This was an intimidation of which the ships were totally unconscious; and which would have been just as effectually produced by a fleet of mere transports; and I see no principle on which I could pronounce these ships entitled—on which I should not be also obliged to pronounce any fleet of merchantmen entitled in a similar situation; for any number of large ships, known to be British, and not known to be merchantmen, would have produced the same effect. The intimidation was entirely passive, there was no *animus* nor design on their part, nor even knowledge of the fact; for it was not till the next day, when their commodore returned from Lord Keith, that they knew anything of the matter, or ever thought of the terror that they had assisted in exciting. I take it to be incontrovertibly true, that no case can be alleged in which a terror so excited has been held to

enure to the benefit of a non-commissioned vessel. Another ground on which it is put, and which it may be proper for me to advert to, is the ground of analogy: that it is a case of assistance, analogous to that of joint chasing, on which it is said to be sufficient, if the non-commissioned ship puts itself in motion; and the cases of *The Twee Gesuster* in the last war, and *The Le Franc*, have been relied upon. I see no ground on which the analogy can be supported. The cases cited were of a very different nature; in both of them the non-commissioned ships chased *animo capiendi*, and contributed materially, in the case of *The Le Franc*, directly and immediately, to the act of capture. In the present case, these ships approached, it is true, the coast of the Cape of Good Hope, but with no *animus capiendi*, with no hostile purpose entertained by themselves; for they were totally ignorant of the objects of the expedition. It is, moreover, obvious to remark, that all cases of joint chasing at sea differ so materially from all cases of conjunct operations on land, that they are with great danger of inaccuracy applied to illustrate each other. In joint chasing at sea, there is the overt act of pursuing, by which the design and actual purpose of the party may be ascertained, and much intimidation may be produced; but in cases of conjunct operations on land, it is not the mere intrusion even of a commissioned ship that would entitle parties to share. The words of the act of parliament direct—'That in all conjunct expeditions of the navy and army against any fortress upon the land, directed by instructions from his Majesty, the flag and general officers, and commanders and other officers, seamen, marines, and soldiers, shall have such proportionable

interest and property as his Majesty under his sign manual shall think fit to order and direct.' The interest of the prize is given to the fleet and army, and it would not be the mere voluntary interposition of a privateer that would entitle her to share. It would be a very inconvenient doctrine, that private ships of war, by watching an opportunity, and intruding themselves into an expedition, which the public authority had in no degree committed to them, should be at liberty to say—'We will co-operate;' and that they should be permitted to derive an interest from such a spontaneous act, to the disadvantage of those to whom the service was originally entrusted. Expeditions of this kind, designed by the immediate authority of the state, belong exclusively to its own instruments, whom it has selected for the purpose; and it might be attended with very grave obstruction to the public service of the country, if private individuals could intrude themselves into such undertakings, uninvited and under colour of their letter of marque. I think, therefore, that the cases of chasing at sea, and of conjunct operations on land, stand on different principles, and that there is little analogy which can make them clearly applicable to each other.

"It is next said, that they were directed to hoist pennants, and that it was the opinion of a very high military officer, in a former case, that the permission to wear the pennant did give the character of a king's ship; but the decision in the very case in which that opinion was offered (in the capture of Negapatam), held, that a ship, which in that case had worn a pennant, was not to be considered in a military character, but as a transport; the mere circumstance, therefore,

that these ships, which were large ships, and had before carried pennants, and had taken them down only out of respect for the king's ship, and were desired to hoist them again, I cannot hold to be a sufficient proof that they were by that act taken and adopted into the military character; I can attribute no such effect to a mere act of civility and condescension.

"In the next place it is argued, that these ships were actually employed in military service, although there is no such averment in the plea. It comes out in evidence only, that their boats were employed in carrying provisions and military stores on shore; that was a service certainly, but not a service beyond the common extent of transport duty. They landed them probably at the same time with the troops, for whose use they were intended; and if not at the same time, still it is no more than what they were bound to do with the stores and provisions they carried." (*The Cape of Good Hope*, 2 Rob. 282.)

In a claim of joint capture on the part of land forces, asserted to have co-operated in the capture of the Dutch fleet in Saldanah Bay in 1796, and which was rejected by Lord Stowell, the learned judge said, "The question is, whether such a case has been made out, on the part of the army, as will support their claim to be considered joint captors? In the first place, it is not pretended that it is a case which comes within the provisions of the Prize Act (33 Geo. 3, c. 16), which directs the army to share, in some cases, in conjunction with the fleet; in the next place, it is not argued that this is a case of concerted operations; that the army and navy might have similar views is not contested, but whatever was done was done sepa-

rately and without concert or communication. Thirdly, it cannot be denied that it lies upon the army to make out a case of joint capture, and to show a co-operation on their part, assisting to produce the surrender; for the surrender was made to the fleet alone, possession was taken by the fleet, the army could not take it; therefore, the *onus probandi* lies on them to prove that there was an actual co-operation on their part; for it is, I think, established by decided authority, and particularly in the late case of *Jaggernaickporam* (Lords, Jan. 26, 1799), before the Lords of Appeal, that much more is necessary than a mere being in sight, to entitle an army to share jointly with the navy in the capture of an enemy's fleet. The mere presence, or being in sight, of different parties of naval force, is, with few exceptions, sufficient to entitle them to be joint captors; because they are always conceived to have that privity of purpose which may constitute a community of interests; but between land and sea forces, acting independently of each other and for different purposes, there can be no such privity presumed; and, therefore, to establish a claim of joint capture between them, there must be a contribution of actual assistance, and the mere presence or being in sight will not be sufficient. Fourthly, I am strongly inclined to hold, that when there is no pre-concert, it must be not a slight service, nor an assistance merely rendering the capture more easy or convenient, but some very material service, that will be deemed necessary to entitle an army to the benefit of joint capture; where there is pre-concert, it is not of so much consequence that the service should be material, because then each party performs the service that is previously

assigned to him, and whether that is important or not, s not so material; the part is performed, and that is all that was expected. But where there is no such privity of design, and where one of the parties is of force equal to the work, and does not ask assistance, it is not the interposing of a slight aid, insignificant perhaps and not necessary, that will entitle the other party to share.

"The principle of terror to support this claim must be of terror operating not mediately and with remote effect, but directly and immediately influencing the capture. I will not say that a case might not, under possible circumstances, arise, in which troops on shore might be allowed to share in a capture made in the first instance by a fleet. I will put this case: Suppose a fleet should come into a hostile bay with a design of capturing a hostile fleet lying there, and a fleet of transports should also accidentally arrive with soldiers on board; suppose these soldiers made good their landing, and gained possession of the hostile shore, and by that means should prevent the enemy from running on shore and from landing, and thereby influenced them to surrender; I will not say that troops in such a situation might not entitle themselves to share, although the surrender had been made actually to the fleet. But suppose the troops to land on a coast not hostile, but on their own coast, I do not apprehend that the possession of such a shore would draw the same consequences after it; for what difference would it make whether there were troops on shore or not? The enemy must know, that in a day or two the landing on a shore to them hostile must be followed by sure and certain captivity, whether there

was a party of military or not. What additional terror does an army hold out? The consequences of captivity would be the same in either case, and unless there had been a notice and denunciation of particular severity, I do not understand that by the laws of war they would be exposed to more than a rigorous imprisonment." (*The Dordrecht*, 2 Rob. 57.)

Where a capture is made by a conjoint expedition, composed of a British naval force and an allied army, the case is withdrawn from the operation of the Prize Act, and the British captors depend wholly on the bounty of the crown for advantage from the capture. (*The Stella del Norte*, 5 Rob. 350; *The British Guiana*, 2 Dod. 151.)

Joint capture will not be rejected by reason of any fraudulent conduct on the part of the actual captor. In the case of *The Waaksamheid* (3 Rob. 7), where the captain of the capturing frigate *Sirius* was charged with having, 'contrary to the rule and practice of the navy,' made no signal of an enemy to other British vessels in sight, Lord Stowell said, in admitting the claim of the latter to joint prize: "Their discontinuance of the chase and alteration of the course is not an act of their own, but an act wrongfully occasioned by neglect or mistake or wilful omission on the part of *The Sirius;* and being so, would not have the effect which generally would follow upon a discontinuance of the chase and alteration of course before the act of capture took place; for generally, a discontinuance and alteration would defeat the interest of a joint captor, by destroying the presumption of assistance and intimidation."

The Galen (1 Dod. 433), *The Herman* (3 Rob. 8),

The Robert (ib. 194), *The Eendraught* (ib App. 35), *The Minerva* (2 Acton, 112), *La Virginie* (5 Rob. 124), *L'Amitié* (6 Rob. 267), and *The Sparkler* (1 Dod. 362), are other cases in which fraud on the part of the captors has been held to vest an interest in the claiming joint captor.

The whole act of capture being the act of the captor, who is the only person therefore responsible for costs and damages, the joint captor is exposed to no share of that liability. (*The Fadrelandt*, 5 Rob. 123.)

Where an actual engagement has previously taken place between a constructive joint captor and the prize, the decision of the court is favourable to the claim of the joint captor. H. M. S. *Sparrow* had engaged *L'Etoile*, a French frigate, a joint cruizer, *The Hebrus* being then in the distance. The next day *L'Etoile* was taken by *The Hebrus*, *The Sparrow* being still in chase. It was contended that *The Sparrow* was entitled to share, and Lord Stowell admitted the claim. "I hold it," said the learned judge, "to be a clear and indisputable rule of law, that if two vessels are associated for one common purpose, as these vessels were, the continuance of the chase is sufficient to give the right of joint capture. Sight under such circumstances is by no means necessary, because, exclusive of that, there exists that which is of the very essence of the claim—encouragement to the friend and intimidation to the enemy. Both *The Hebrus* and the enemy's frigate knew that *The Sparrow* was astern, and that she was using her best endeavours to come up. She was a consort of the actual captor, and pursued the prize in conjunction with her, and

had not discontinued the pursuit at the time when the capture was consummated." (2 Dodson, 107.)

Where two cruizers casually meet, one of which is commanded by an officer senior to the other commander, though of the same rank, a circumstance which by the rules of the service gives to the former the command, and he directs his junior to pursue one of two hostile vessels in sight, while he himself chases the other, both vessels being taken, the junior is entitled to share as joint captor of both. In the case of *The Empress* (1 Dod. 368), Lord Stowell said—"I consider it to be a clear rule of law, that ships engaged in a joint enterprize of this kind, and acting under the orders of the same superior officer, are entitled to share in each other's prizes; and it is certainly for the benefit of the public service that a rule of this sort should prevail, in order that the public force of the state may be distributed so as to produce the greatest possible advantage to the country, and the greatest possible annoyance to the enemy." Mere previous concert, however, between several cruizers will not give all a right to share in the prizes of each, where they have so dispersed themselves that it is manifestly impossible for either to receive support from the others. *The Mars* (2 Rob. 22) was the case of a French ship taken by one of three king's ships, which, being apprized of the design of the enemy to escape from Port au Prince, had taken their stations at different outlets to intercept them. The capture was made by one ship. A claim was given on behalf of the other two to share as joint captors, though not present at the capture, but it was rejected. Nor will

a claim to joint capture enure to an associated cruizer, where, having before reconnoitred the prize, she had actually stood off on another course. (*The Lord Middleton*, 4 Rob. 155; see, to the same effect, *The Rattlesnake*, 2 Dod. 32.) A vessel detached from a squadron by a signal to chase, and which, after accomplishing that duty, engages in a second chase and captures, is exempt from any claim to joint prize on the part of the associated squadron. *Le Bon Aventure* (1 Acton, 211) was the case of a French ship captured by H. M. S. *Albion* under the circumstances described; the associated squadron asserted a claim of constructive joint capture, but the Lords of Appeal rejected it. "Upon the principle thus advanced," said Sir W. Grant, "it is necessary to inquire, under the circumstances of the present case, whether a vessel commencing a second chase in sight of a fleet of which she had constituted a part before she had been detached by signal upon a former chase, and capturing the second chase at any distance from such a fleet, would necessarily, upon this principle, be compelled to let in the claim of the whole fleet to share in a prize so made, notwithstanding such fleet afforded no assistance or co-operation in the capture, but actually bore away from the captor on another tack. No such principle has ever been recognized."

There is one species of recapture from the enemy which vests the whole interest in the recaptor—namely, where an enemy's ship taken originally by one English vessel, and lost again to an enemy's cruizer, is subsequently recaptured by another English ship. It has occasionally become a subject of discussion in the Prize Court of this country, and also in France, whether

any interest revested in the first seizor; and in 1778, in the case of *The Lucretia*, the Court of Admiralty was disposed, though apparently in departure from more ancient precedents, to consider the first taker as the captor, and the subsequent taker as the recaptor, entitled to a high salvage. It does not appear that this case was appealed from. But in another instance the same point was much contested before the Lords of Appeal, in the case of *The Polly* (Lords, 21st Nov. 1780), in which the prize had been rescued by the American crew, and retaken, and condemned to the last captor in the Vice-Admiralty Court of New York. On appeal, brought by the first seizor, the Lords affirmed the sentence of the court below, holding that the original captor had not completed his possession; that the incipient interest which had been acquired by the first taker was entirely divested by the subsequent rescue, and that the final British captor was to be considered as the efficient captor, and as such entitled to the whole benefit of the prize. In the case of *The Marguerite* (3rd April, 1781), the same question was brought before the Court of Appeal, with the only difference, that the first recapture had been made by a French frigate. The Lords pronounced a decree to the same effect, and condemned the appellant in costs. Valin (*Traité des Prises*, c. 6, § 1) says, that this point was established in the French Court of Prize in favour of the ultimate captor, by a decree in 1748.

RANSOM.

When by lawful means a belligerent had possessed himself of property belonging to his enemy, it was for-

merly the custom among almost all nations to redeem it from his hands by ransom. But ransom from the hands of an enemy is now little known to the commercial law of England; for, by the statute 22 Geo. 3, c. 25, the ransom of any ships, or merchandizes on board the same, belonging to any subject of this country, and taken by the subjects of any state at war with his majesty, or by any person committing hostilities against his majesty's subjects, is absolutely prohibited; and by the statutes of 43 Geo. 3, c. 160, and of the 45 Geo. 3, c. 72, such ransom is again prohibited, unless in the case of extreme necessity, to be allowed by the Court of Admiralty; and all contracts for ransom contrary to these statutes are made void and subjected to a penalty of 500*l.* (See also 55 Geo. 3, c. 160, ss. 9, 10, 11, 12.) "Ransoms," said Lord Stowell, in the case of the ships taken at Genoa, (*ub. sup.*) "have been forbidden as subject to great abuse, being, in the common acceptation, contracts entered into at sea by individual captors, and liable to be abused, to the great inconvenience of neutral trade. But even ransoms under circumstances of necessity are still allowed. A ransom bill, however, when not locally prohibited, is a war contract protected by good faith and the law of nations; and though the contract is regarded in England as tending to relax the energy of war and deprive cruizers of the chance of recapture, "it is in many views" (writes Chancellor Kent, i. 114) "highly reasonable and humane. Other maritime nations regard ransom as binding, and to be classed among the few legitimate *commercia belli.*" Ransom has never been prohibited in the United States; and the act of congress of August 2nd, 1813, which interdicted the

use of British licences or passes, did not apply to the contract of ransom. (See Azuni *on Maritime Law*, c. 4, art. 6; Emerigon, i. c. 12, s. 21; Valin, ii. art. 66; Le Guidon, c. 6, art. 2; Grotius, book 3, c. 19; *Goodrich* v. *Gordon*, 15 John's Rep. 6.) The effect of a ransom is equivalent to a safe-conduct granted by the authority of the state to which the captor belongs, and it binds the commanders of other cruizers to respect the safe-conduct thus given; not only the cruizers of the belligerent nation, but, under the implied obligation of the treaty of alliance, those also of the captor's allies. (*Miller* v. *The Resolution*, 2 Dallas, 15.) The safe-conduct so implied, however, requires that the vessel should be found within the course prescribed, and within the time limited by the contract, unless forced out of her course by stress of weather or unavoidable necessity. (Pothier, *Traité du Droit de Proprieté*, No. 134, 135; Valin, *Ord. des Prises*, art. 19.) The ransom stipulated is due, even should the vessel ransomed be wrecked before she arrives in port, for the captor had not insured against the perils of the sea, but only against recapture by cruizers of his own nation or of its allies. (Pothier, No. 138.) If the captor himself should be taken by the enemy, together with his ransom bill, the ransom becomes part of the lawful conquest of the enemy, and the debtors of the ransom are discharged from their contract. (Id., No. 139.)

In the British courts no suit will lie by the enemy *in propriâ personâ* on a ransom bill, notwithstanding it is a contract arising *jure belli*. (*Anthon* v. *Fisher*, Douglas, 649; *The Hoop*, 1 Rob. 169.) The only remedy to enforce payment of the ransom bill, for the

benefit of the enemy captor, is by an action by the imprisoned hostage in the courts of his own country, for the recovery of his freedom (*The Rebecca*, 5 Rob. 102); though Lord Mansfield emphatically declared his opinion that the contract was worthy to be sustained by sound morality and good policy, and as governed by the law of nations and the eternal rules of justice. (*Cornu* v. *Blackburne*, Douglas, 641.) Both in France and in Holland the practice is to sustain such actions by the owner of the ransom contract. *Ricard* v. *Bettenham*, 3 Burr. 1734; Pothier, *ub. sup.* No. 144; *The Lord Wellington*, 2 Gallis. 104; *Maissonnaire and others* v. *Keating*, ib. 336; *Gerard* v. *Ware*, Peters' C. R. 142; and *Moodie* v. *Brig Harriet*, Bees. Rep. 128, are leading American cases of ransom.

RECAPTURE.

A prize taken from the enemy who had made it is called *recapture*, and the person who takes it the *recaptor*. The term recapture, as distinguished from rescue, is ordinarily employed when a prize, having been captured by an enemy, is recovered from his possession by the arrival of a friendly force; whereas the term rescue more usually denotes, that recovery which is effected by the rising of the captured party himself against his captor.

"There is no rule, operating with the proper force and authority of a general law, respecting the time when property vests in the captor of a recaptured vessel. It may be fit there should be some rule, and

it might be either the rule of immediate possession or the rule of pernoctation and twenty-four hours possession, or it might be the rule of bringing *infra præsidia*, or it might be a rule requiring an actual sentence of condemnation. Either of these rules might be sufficient for general practical convenience, although, in theory, one, perhaps, might appear more just than another; but the fact is, there is no such rule of practice. Nations concur in principle, indeed, so far as to require firm and secure possession; but their rules of evidence respecting the possession are so discordant and lead to such opposite conclusions, that the mere unity of principle forms no uniform rule to regulate the general practice. But were the public opinion of European states more distinctly agreed on any principle, as fit to form the rule of the law of nations on this subject, it by no means follows that any one nation would be under an obligation to observe it. That obligation would arise only from a reciprocity of practice in other nations; for from the very circumstance of this prevalence of a different rule among other nations, it would become not only lawful, but necessary to that one nation to pursue a different conduct; for instance, where there is a rule prevailing among other nations that the immediate possession and the very act of capture should divest the property from the first owner, it would be absurd in Great Britain to act towards them on a more extended principle, and to lay it down as a general rule that a bringing *infra præsidia*, though probably the true rule, should in all cases of recapture be deemed necessary to divest the original proprietor of his right; for the effects of ad-

hering to such a rule would be gross injustice to British subjects; and a rule from which gross injustice must ensue in practice can never be the true rule of law between independent nations; for it cannot be supposed to be the duty of any country to make itself a martyr to speculative propriety, were that established on clearer demonstration than such questions will generally admit. Where mere abstract propriety, therefore, is on the one side, and real practical justice on the other, the rule of substantial justice must be held to be the true rule of the law of nations between independent states." (Lord Stowell, *The Santa Cruz*, 1 Rob. 58.) "If I am asked, under the known diversity of practice on this subject, what is the proper rule for a state to apply to the recaptured property of its allies, I should answer that the liberal and rational procedure would be to apply, in the first instance, the rule of that country to which the recaptured property belongs. I admit the practice of nations is not so, but I think such a rule would be both liberal and just. To the recaptured it presents its own consent, bound up in the legislative wisdom of its own country: to the recaptor it cannot be considered as injurious. Where the rule of the recaptured would condemn, whilst the rule of the recaptor, prevailing among his own countrymen, would restore, it brings obvious advantage; and even in the case of immediate restitution, under the rules of the recaptured, the recapturing country would rest secure on the reliance of receiving reciprocal justice in its turn.

"It may be said, what if this reliance should be disappointed? Redress must then be sought from retaliation; which, in the disputes of independent states,

is not to be considered as vindictive retaliation, but as the just and equal measure of civil retribution. This will be their ultimate security, and it is a security sufficient to warrant the trust; for the transactions of states cannot be balanced by minute arithmetic; something must on all occasions be hazarded on just and liberal presumptions.

"Or, it may it be asked, what if there is no rule in the country of the re-captured? I answer, first, this is scarcely to be supposed; there may be no ordinance, no prize acts, immediately applying to re-capture, but there is a law of habit, a law of usage, a standing and known principle on the subject, in all civilized, commercial countries; it is the common practice for European states, in every war, to issue proclamations and edicts on the subject of prize, but till they appear Courts of Admiralty have a law and usage on which they proceed, from habit and ancient practice, as regularly as they afterwards conform to the express regulations of the Prize Acts. But, secondly, if there should exist a country in which no rule prevails, the recapturing country must then, of necessity, apply its own rule, and rest on the presumption that that rule will be adopted and be administered in the future practice of its allies.

"Again it is said, that a country applying to other countries their own respective rules will have a practice discordant and irregular; it may be so: but it will be a discordance proceeding from the most exact uniformity of principle; it will be *idem per diversa*. A rule may bear marks of apparent inconsistency, and nevertheless contain much relative fitness and propriety; a regulation may be extremely unfit to be

made which, yet, shall be extremely fit, and shall, indeed, be the only fit rule to be observed towards other parties who have originally established it for themselves. The actual rule of the maritime law of England on this subject I understand to be clearly this: that the maritime law of England having adopted a most liberal rule of restitution on salvage, with respect to the re-captured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle. In the words of Sir E. Simson, the rule is, 'that England restores, on salvage, to its allies; but if instances can be given of British property retaken by them, and condemned as prize, the Court of Admiralty will determine these cases according to their own rule.'" Lord Stowell, ub. sup.)

Neutral property, captured by one belligerent, and recaptured by another, is not entitled to seek compensation from the original captor, unless it can be proved that he, *bonæ fidei* possessor, has committed irregularities which produce irreparable loss. "The law," says Lord Stowell, *The Betsey* (1 Rob. 95), "is clear, that a *bonæ fidei* possessor is not responsible for casualties; but that he may, by subsequent misconduct, forfeit the protection of his fair title, and render himself liable to be considered as a trespasser from the beginning. This is the law, not of this court only, but of all courts, and one of the first principles of universal jurisprudence. Objects of recapture cannot be covered under the plea of donation." "It has been attempted," said Lord Stowell, in *The Santa Cruz* (ub. sup. 75), "to raise distinctions between these titles;

but on all legal considerations, they are precisely the same; they are both equally matter of prize: donation between enemy and enemy cannot take effect. The very character of enemy at once extinguishes all civil intercourse, from which such a title could arise."

A neutral vessel recaptured from the enemy may, if necessary for the mutual safety and interest of herself and the recaptors, be equipped, armed and employed in protecting herself and the recaptors from the attack of the enemy's cruizers at her own risk; and should she become a wreck whilst and in consequence of being so employed, there is no claim on the part of neutral owners for restitution in value. (*The Swift*, 1 Acton, 1.)

That kind of rescue which is effected by the rising of the captured to defeat their captor, is, as contradistinguished from recapture, a matter rather of merit than of duty. In the *Two Friends* (1 Rob. 271), Lord Stowell said, "Seamen are not bound, by their general duty as mariners, to attempt a rescue; nor would they have been guilty of a desertion of their duty in that capacity if they had declined it. It is a meritorious act to join in such attempts; but it is an act perfectly voluntary, in which each individual is a volunteer, and is not acting as a part of the crew of the ship in discharge of any official duty, either ordinary or extraordinary."

A rescue effected by the crew, after capture, when the captors are in actual possession, does not exempt the prize from condemnation. "For a rescue," said Lord Stowell, in *The Dispatch* (3 Rob. 278), "can be nothing else than, as the very term imports, a delivery from force by force." In *The Elsebe* (4 Rob. 408), it is laid down, that the resistance of the con-

voying ships is the resistance of the whole convoy; whence it follows, that in such cases the whole convoy is subject to confiscation. But from *The Pennsylvania* (1 Acton, 33), it appears, that if a neutral vessel has been captured, and the captors, whether from want of hands to navigate her, or for the sake of making other prizes, or from any other motive, allow the neutral commanders to resume the direction of the vessel, without any express agreement binding those commanders to bring her in for adjudication in pursuance of the original capture, then the escape of the neutral will not be regarded as a rescue or a resistance. On the same principle, it was held in *The San Juan Battista* (5 Rob. 33), that a mere attempt to escape before any possession assumed by the captor does not draw with it the consequences of condemnation. And the same case establishes, that, unless the neutral vessel have reasonable grounds to be satisfied that a war has actually broken out, even a direct resistance will not superinduce the penalty.

"If a neutral master," says Lord Stowell (*The Catharina Elizabeth*, 5 Rob. 232), "attempts a rescue, he violates a duty which is imposed on him by the law of nations, to submit to come in for inquiry as to the property of ship or cargo; and if he violates that obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner; and it would, I think, extend also to the confiscation of the whole cargo entrusted to his care, and thus fraudulently attempted to be withdrawn from the rights of war. With an enemy master the case is very different; no duty is violated by such an act on his part: *lupum auribus teneo*, and if he can withdraw himself he has a right to do so."

SALVAGE.

Salvage, in the military sense of the term, is the reward given to the recaptor of a captured ship by the owner of the property; for although it is the rule of this country, as among its own subjects, to restore such recaptured property to the original owner, it is not the rule to make the recaptor afford this restitution altogether gratuitously. By the 43rd Geo. 3, c. 160, s. 39, the legislature fixed certain rates of salvage, according to the circumstances of the recapture. The salvage therein allotted to British recaptors is at the rate of one-eighth of the beneficial interest in the whole recaptured property, where the recapture is effected by ships belonging to the royal navy; and one-sixth, where it is effected by private ships; the judge of the court being at liberty, in cases of recapture by the joint efforts of king's ships and private vessels, to order such salvage as he shall deem reasonable. (*The Dickenson*, Hay & Marriott, 48; *The Betsey*, ib. 81; *The Two Friends*, 1 Rob. 279; and see the recent Prize Proclamation in Appendix.)

To support a claim for military salvage, two circumstances must concur; first, the taking must be lawful; secondly, there must be meritorious service rendered to the recaptured.

Salvage is not confined to recapture alone; it is given also in cases of rescue, where rescue is not the result of the arrival of fresh succour, which relieves the weaker party before he falls into the power of the adversary. In *The Franklin* (4 Rob. 147), Lord Stowell said, "No case has been cited, and I know of none in which military salvage has been given, where the property rescued

was not in the possession of the enemy, or so nearly as to be certainly and inevitably under his grasp. There has been no case of salvage where the possession, if not absolute, was not almost indefeasible, as where the ship had struck, and was so near as to be virtually in the hands and gripe of the enemy." When the rescue is of the other description, that is to say, when it is effected by the rising of the captured crews against the captors, a salvage is given. (*The Two Friends*, 1 Rob. 271.)

It is not necessary, in point of principle, for the establishment of a claim of salvage, that it should have been primarily the intention of the captor to recover the property. It might not have been in his immediate contemplation, perhaps, nor even within his knowledge; and yet if the service performed—if the recovery of the property—is the immediate and necessary result of what he has done, he will be entitled to salvage. (*The Progress*, Edw. 211.)

In cases of recapture, no letter of marque from the sovereign is required to give to the recaptor the benefit of the same salvage to which he would have been entitled, if he had been provided with letters of marque. (*The Helen*, 3 Rob. 224; *The Urania*, 5 Rob. 148; *The Progress*, Edwards, 215; *The Hope*, Hay & Marriott, 216.)

Salvage is not due to a man-of-war for rescuing from the enemy a hired transport employed in the same expedition. This case rests on the same principle as that of assistance afforded by one vessel to another in battle, —the principle of mere duty. (*The Belle*, Edw. 66.) Salvage is given on a vessel purchased at sea from the enemy, for the purpose of returning her to the owner,

for it is not necessary that the recovery of property should be attended with personal risk to the salvor. (*The Henry*, 162.) Every person assisting in rescue has a lien on the thing saved. He has an action *in personam* also; but his first and proper remedy is *in rem*; and his having the one is no argument against his title to the other. There is one species of recapture which vests the whole interest in the recaptors, namely, that of an enemy's vessel taken by one English vessel, lost again by an enemy's cruizer, and subsequently re-captured by another English ship. (*The John and Jane*, 4 Rob. 217, note.)

The master and crew, in case of merchant ships, are, in strict language, the only salvors. The owners have in general no great claim; as to labour and danger, none. They come in only under the equitable consideration of the court for damage or risk, which their property might have incurred. (*The San Bernardo*, 1 Rob. 178.)

The right of salvage on recapture is not extinguished by subsequent capture and condemnation in an enemy's port, when the sentence condemning the property is over-ruled by an order of release from the sovereign power of the state. (*The Charlotte Caroline*, 1 Dod. 192.)

Where a recapture is made by a king's ship, all other king's ships in sight are permitted to come in as joint salvors. There is a reciprocity in this rule which operates sometimes to the advantage and sometimes to the disadvantage of every vessel in the service. Not so where a recapture is made by a king's ship in sight of a privateer; in that case there is no reciprocity, as the privateer is not permitted to share. It would be

hard, therefore, if the privateer, being the actual captor, and not having that reciprocal interest in other cases, she should be deprived of a much greater proportion of the reward, and should only share on terms of reciprocity, where the king's ship is only the constructive recaptor, from the mere accident of being in sight, perhaps at a great distance and unconscious of the fact. Now, what are the circumstances of the present case? It did appear to me, on the evidence offered to the court, that the interposition of the privateer was not fraudulent. It was not the case of a privateer stepping in at the end of a long chase, perhaps, to deprive the king's ship of the due reward of her own activity and enterprise. Here it was clear that both were in actual pursuit of the enemy. It was not a constructive recapture on either side; there was a concurrence of endeavour in both, though the privateer came up first and struck the first blow. Considering them both, therefore, as joint actual recaptors, I see no reason why I should take the case out of the common operation of that principle which apportions the reward to the parties according to their respective forces." (*The Wanstead*, 1 Edwards, 269; *The Providence*, ib. 270; *The Dorothy Foster*, 6 Rob. 88.)

Revenue cutters are entitled to salvage on recapture as private ships of war, viz., to one-sixth. (See also *The Bellona*, Edwards, 63, and *The Sedulous*, 1 Dodson, 253.) Store ships are held, as to recapture, to be ships of war, and as such only entitled to one-eighth salvage. (*The Sedulous*, ub. sup.)

In cases of recapture, to make the freight contributary to salvage, the question is, whether the freight was in the course of being earned? In giving freight,

the court does not make separations as to minute portions of it. If a commencement has taken place, and the voyage is afterwards accomplished, the whole freight is included in the valuation of the property on which salvage is given. (*The Dorothy Foster*, 6 Rob. 88.)

It is no case of salvage when the vessel has never come into the actual and bodily possession of the recaptor. The terms of the Act of Parliament, "if at any time afterwards *surprised and retaken* by any of his Majesty's ships of war, &c.," point to a case attended with the circumstance of an actual possession taken. (*The Edward and Mary*, 3 Rob. 305.) In order to entitle to salvage, as upon a recapture or escape, the property must have been in the possession, either actual or constructive, of the enemy. Salvage is not allowed merely for stopping a ship going into an enemy's port. (*The Ann Green and cargo*, 1 Gall. 293.)

Salvage is due, as a principle of international law, from neutrals also. The particular rates, indeed, which our statutes assign are binding only in cases between British subjects; but in cases of restitution to the subjects of other states it has been usual with our courts to assess such a salvage as the nature of the service performed might reasonably appear to deserve (Marshall, 474), and that assessment is usually, though not necessarily, made according to the British rates. "The character and condition of the person," said Lord Stowell, in *The Two Friends* (1 Rob. 285), "is a fit circumstance to form a material consideration in distributing the reward, because the nature of a reward

carries with it a necessary reference to the rank and circumstances of the person rewarded."

There is exemption from salvage, where the property of a nation not engaged in hostility with the enemies of this country, happens to be taken as prize by them, and retaken out of their hands by British subjects; here the probability of its condemnation in the courts of the country of the captors is to be considered; and unless there appears to be ground, on which it may be supposed that it would have been condemned in those courts, it is to be restored without the payment of any salvage. In the last war, the conduct of the cruizers and prize courts of France, having given reason to apprehend that neutral property, arrested by the former on the high seas, would, in almost all cases, be condemned by the latter, salvage was usually allowed to the recaptors of neutral property out of the hands of the French by our Court of Admiralty, and such allowance was not thought unreasonable by the neutral merchants. But this was treated as an exception to the general rule, founded on particular circumstances. (*The Eleonora Catherina*, 4 Rob. 156; *The War-Onshan*, 2 Rob. 299; *The Carlotta*, 5 Rob. 54; *The Huntress*, 6 Rob. 104; Abbot's Law of Shipping, part 3, c. 11, s. 13; *The Samson*, 6 Rob. 410; *The Barbara*, 3 Rob. 171.)

POSTLIMINIUM.—RESTITUTION.

The *Jus Postliminii* was a fiction of the Roman law, by which persons or things, taken by the enemy, were restored to their former state, on their coming again under the power of the nation to which they formerly belonged. *Postliminium fingit eum qui captus est, in civitate semper fuisse.* (*Instit*, i. 12, 5.) It is a right, says Chancellor Kent (i. 115), recognized by the law of nations, and contributes essentially to mitigate the calamities of war. When property captured by the enemy is retaken by our allies or auxiliaries, or in any other manner falls into their hands, this, so far as relates to the effect of the right, is precisely the same thing as if they were come again into our power; since, in the cause in which we are jointly embarked, our power and that of the allies is but one and the same. So that when possessions, taken by the enemy, are either recaptured or rescued from him by the fellow-subjects or allies of the original owner, they do not become the property of the recaptor or rescuer, as if they had been a new prize; but are restored to the possession of the original owners upon certain terms. Moveables are not, in strictness, entitled to the benefit of postliminium, their identification being difficult, if not impracticable; but even these are restored to the original owners, if retaken from the enemy immediately after his capture of them; in which case the proprietor neither finds a difficulty in recognizing his effects, nor is presumed to have relinquished them. Real property, being readily identified, is more completely within the scope of the right.

Postliminium, however, does not take effect in neutral countries: for when a nation chooses to remain neuter in war, she is bound to consider it as equally just on both sides, so far as relates to its effects; and consequently, to look upon every capture made by either party as a lawful acquisition, with the exception of cases where the capture itself is an infringement of the jurisdiction or rights of the neutral power. (*M'Donough* v. *Dannery*, 3 Dallas, 188, 189; *The Josepha Segunda*, 5 Wheaton, 338, 358.) For a neutral to allow one of the parties, in prejudice to the other, to enjoy in her dominions the right of claiming things taken by the latter, would be declaring in favour of the former, and departing from the line of neutrality.

The law of *postliminium* implies that the party claiming it returns to his previous character; and he who, during the whole war, has been the subject of the enemy alone, must be considered, when he falls into the hands of the rival state, not as returning to a previous character, but as acquiring a character absolutely new. (*The Boedes Lust*, 5 Rob. 233.) The right of *postliminium* takes place only within the territories of the captor or of his ally (Vattel b. 3, c. 14, s. 207, 208); and if a prize be brought into a neutral port by the captors, it does not return to the former owner by *postliminium*, because neutrals are bound to take notice of the military right which possession gives, and which is the only evidence of right acquired by military force, as contradistinguished from civil rights and titles. They are bound to take the fact for the law. Strictly speaking, there is no such thing as a marine tort between belligerents. All cap-

tures are to be deemed lawful, and they have never been held within the cognizance of the prize tribunals of neutral nations. (*L'Amisted de Rues*, 5 Wheaton, 390.) With respect to persons the right of *postliminium* takes place even in a neutral country; so that if a captor brings his prisoners into a neutral port he may, perhaps, confine them on board his ship, as being, by fiction of law, part of the territory of his sovereign, but he has no control over them on shore. (Vattel, b. 3, c. 7, s. 132; Kent, i. 116; Bynkershoeck, by Duponceau, p. 116; Austrian Ordinance of Neutrality, Aug. 7, 1803, Art. 19.)

With respect to real property, the acquisition is not fully consummated till confirmed by a treaty of peace, or by the entire submission or destruction of the state to which it belonged. (Puffendorff, *Droit de la Nature*, par Barbeyrac, Liv. 8, c. 6, s. 20.) Till then the sovereign of that town has hopes of retaking it, or of recovering it by a peace; and from the moment it returns into his power, he restores it to all its rights, and consequently it recovers all its possessions, as far as in their nature they are recoverable. But if the property, town, or territory, or part of territory, whatever it may be, has been ceded to the enemy by the treaty of peace, or has completely fallen into his power by the submission of the whole state, she has no longer any claim to the right of *postliminium;* and the alienation of any of her possessions by the conqueror is valid and irreversible. (Vattel, *ub. sup.*; Martens, b. 8, c. 3, s. 11.)

In a land war, moveable property, after it has been in the possession of the enemy twenty-four hours, becomes absolutely his, without any right of postli-

minium in favour of the original owner, and by the ancient and strict rule of the law of nations, confirmed by various ordinances of continental powers, captures at sea fell under the same rule. (Ordon. des Prises, 1681, Art. 8.) The right, however, as to naval prize, is now everywhere understood to continue until sentence of condemnation and no longer. (Lord Stowell, *The Flad Oyen*, 1 Rob. 134; *Goss* v. *Withers*, 2 Burr. 683; *The Constant Mary*, 3 Rob. 97; *Hamilton* v. *Mendes*, 1 Blackstone, 27; *Assievedo* v. *Cambridge*, 10 Mod. 79; *The Huldah*, 3 Rob. 237; 13 Geo. 2, c. 4; 17 Geo. 2, c. 34; 19 Geo. 2, c. 34; 43 Geo. 3, c. 160.)

The United States, by the act of Congress, 3rd March, 1800, directed the restoration of captured property to the foreign and friendly owner, on the payment of reasonable salvage; but the act was not to apply when the property had been condemned as prize by a competent court before recapture, nor when the foreign government would not restore the goods or vessels of the citizens of the United States, under the like circumstances. This statute, also, continued the *Jus Postliminii* until the property was divested by a sentence of condemnation.

If, however, a treaty of peace makes no specific provision relative to captured property, it remains in the same position in which the treaty finds it, and is tacitly conceded to the possessor. The right of postliminium no longer exists after the conclusion of the peace; it is a right which belongs exclusively to a state of war (Vattel, b. 3, c. 14, s. 216); and, therefore, in the case of *The Sophie* (6 Rob. 138), the British Court of Admiralty decided that a ship which

had been sold to a neutral, after an illegal condemnation by a prize tribunal, and which would, therefore, not have been considered as fairly transferred during war, was to be deemed, by the intervention of peace, a legitimate possession in the neutral's hands, and cured of all defects in the title. For as the title of the enemy captor himself would have been quieted by the intervention of peace, so it was thought to be but reasonable that the general amnesty should have the same effect upon property in the hands of those to whom that enemy might have assigned it. "Otherwise," observed Lord Stowell, "it could not be said that the intervention of peace would have the effect of quieting the possession of the enemy; because, if the neutral possessor was to be dispossessed, he would have a right to resort back to the belligerent seller, and demand compensation from him. And as to a renewal of war, though that may change the relation of those who are parties to it, it can have no effect on neutral purchasers, who stand in the same situation as before."

When the assignment has been made by the hostile captor, regularly and *bonâ fide*, and the party to whom the captor has so made that assignment was, at the time of making it, a neutral, the title in the hands of such assignee will not be defeated by his subsequently becoming an enemy; it would only be liable with his other property to be seized as prize of war. (*The Purissima Concepçion*, 6 Rob. 45.)

The statute 43 Geo. 3, c. 160, s. 39, makes an exception as to ships which have been set forth by the enemy as vessels of war, enacting that these shall not be restored to the original owners, but belong wholly

to the recaptors. So, if the property recaptured were captured at first in an illegal trade, then the original right is divested, and the previous owner will not be admitted to restitution from the recaptors. (*The Walsingham Packet*, 2 Rob. 77.)

Suits for restitution in the Admiralty Courts should be brought as early as possible after the transaction. In *The Mentor* (1 Rob. 179), which was a suit for restitution instituted seventeen years after the capture, Lord Stowell said: "It is not within my recollection that a case of such antiquity has ever been suffered to originate in the Court. I do not say that the statute of limitations extends to prize causes—it certainly does not—but every man must see that the equity of the principle of that statute in some degree reaches the proceedings of this Court, and that it is extremely fit that there should be some rule of limitation provided by the discretion of the Court, attending only to the nature and form of the process conducted here; by which captors or other persons should be protected against antiquated complaints."

The rule of this country in giving effect to the right of postliminium between her own subjects and those of her allies, is thus stated in the judgment of Lord Stowell in *The Santa Cruz* (1 Rob. 49): "The actual rule I understand to be this, that the maritime law of England, having adopted a most liberal rule of restitution with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies till it appears that they act towards British property on a less liberal principle. In such a case, it adopts their rule, and treats them according to their own measure of justice." (See also *The San Francisco*, 1 Edwards, 279.)

LICENCE.

The suspension of commercial intercourse during war with, or on the part of the enemy, may be removed by licence obtained from the sovereign. "It is indubitable," said Lord Stowell, in *The Hoffnung* (2 Rob. 162), "that the king may, if he pleases, give an enemy liberty to import; he may, by his prerogative of declaring war and peace, place the whole country of Holland in a state of amity; or, *à fortiori*, he may exempt any individual from a state of war;" but the licence to enable an enemy to import goods must be express, for an enemy will not be protected by a general licence (*The Hendrick*, 1 Acton, 328), and it has not been usual to grant licences to an enemy. (Phillimore, 2nd ed. 9, in notes, and preface, xx. xxi.) The right itself is established by the common law. (2 Roll. Abr. 173, pl. 3; 8 T. R.; *Vandyck* v. *Whitmore*, 1 East, 475.) "A licence," said Lord Stowell (*The Cosmopolite*, 4 Rob. 11), "is a high act of sovereignty; an act immediately proceeding from the sovereign authority of the state, which is alone competent to decide on all the considerations of commercial and political expediency, by which such an exception from the ordinary consequences of war must be controlled. Licences being then high acts of sovereignty, they are necessarily *stricti juris*, and must not be carried farther than the intention of the great authority which grants them may be supposed to extend." Accordingly, in *The Vriendschap* (4 Rob. 96), the question turned upon a quantity of barilla sent from London to Rouen. The claimants had obtained a licence to export certain

enumerated articles thither, but the barilla was not included in that licence, and Lord Stowell condemned the cargo. "If the Court is convinced," said the learned judge, "that out of a thousand instances, there would be nine hundred and ninety-nine of abuse, and in opposition to one fair and *bonâ fide* execution of such an intention as is here alleged, it is reasonable to conclude that such a practice would not be permitted—if this could be admitted, what has any British merchant to do but to put articles of any sort on board under such pretences? and how is it possible to prevent them from going without molestation into the hands of the enemy?" (See also *Shiffner* v. *Gordon*, 12 East, 302.) "Two circumstances," added Lord Stowell, in *The Cosmopolite*, "are required to give the due effect to a licence: first, that the intention of the grantor shall be pursued; and secondly, that there shall be an entire *bona fides* on the part of the user. It has been contended, that the latter alone should be sufficient, and that a construction of the grant merely erroneous should not prejudice. This is, I think, laid down too loosely. It seems absolutely essential that that only shall be done which the grantor intended to permit: whatever he did not mean to permit is absolutely interdicted; and the party who uses the licence engages not only for fair intention, but for an accurate interpretation and execution. When I say an accurate interpretation and execution, I do not mean to exclude such a latitude as may be supposed to conform to the intentions of the grantor, liberally understood.

"Another material circumstance in all licences (*ub. sup.*) is the limitation of time in which they are to be

carried into effect; for as it is within the view of government, in granting these licences, to combine all commercial and political considerations, a communication with the enemy might be very proper at one time, and at another very unfit and highly mischievous; it might be highly proper in 1799, and highly inexpedient in 1801. Time therefore appears to be a very important ingredient; if the party takes upon himself to extend the term of the licence in this respect, it would be, in my opinion, a licence not reasonably assumed." (See also *Vandyck* v. *Whitmore*, 1 East, 475.)

In the construction of a licence by the Court, the port of shipment is of great moment. In *The Twee Gebroeders* (1 Edwards, 95), the vessel had obtained a licence for the purpose of bringing away a cargo from Bordeaux to any port of this kingdom. The parties interested, however, thought proper, without any communication with government, to change this licence, so as to accommodate it to a voyage from the port of St. Martin. Lord Stowell condemned the ship and cargo. "It has been said," he observed, "that specific licences were at the time obtained for the purpose of carrying on this trade from St. Martin's, and that the deviation cannot therefore be considered as contrary to the policy of government; but I cannot consider that as a sufficient excuse. Such an alteration can only be made upon a particular representation, leaving government to judge of the terms on which it may be proper to comply with the request. Parties cannot be permitted to take licences for one purpose and apply them to another; in such a case it would be

going beyond the powers of this Court to extend its protection."

The licence also must be strictly employed by the party to whose use it was granted, or by some person legally connected with him, for the purpose of that particular transaction. (*The Jonge Johannes*, 4 Rob. 263.) "The great principle in these cases," said Lord Stowell, "is, that subjects are not to trade with the enemy without the special permission of the government; and a material object of the control which government exercises over such a trade is, that it may judge of the particular persons who are fit to be entrusted with an exemption from the ordinary restrictions of a state of war. I hardly conceive I am upon any principle warranted to declare, that when a licence is granted to one person it may be extended to the protection of all other persons who may be permitted by that person to take advantage of it." This case, and that of *The Aurora* (4 Rob. 218), fortified by that of *Barlow* v. *Mackintosh* (12 East, 311), may be regarded as overruling the decisions in the cases of *Defflis* v. *Parry* (3 Bos. & Pul. 3), and of *Timson* v. *Merac* (9 East, 35), and *Rawlinson* v. *Janson* (12 East, 223), in which the Common Law Courts manifested a disposition to a less strict construction of licences.

The holder of a licence must be prepared with evidence to substantiate, if necessary, that he is also the *bonâ fide* holder of it. "The possibility of such facts," said Lord Ellenborough in *Barlow* v. *Mackintosh* (ub. sup.) "calls upon the shipper of the goods, who endeavours to avail himself of it, to connect himself by other evidence than the mere possession of the par-

ticular licence; otherwise, in the absence of all proof of such connection, there is a natural suspicion, a preponderance of probability, that the licence has been used before to cover an antecedent voyage, and against the lawful use of it upon the voyage in question. If it be sufficient for a party, at any time, to stand upon his mere possession of such a general licence, there can be no check whatever upon any indefinite abuse of them."

A general licence must be construed strictly, and will not extend to the protection of enemy's property. (*The Josephine*, 1 Acton, 313.)

A licence, which particularly specifies any flag, will protect even enemy's property. But in all cases the national character of the licence must be clearly established. (*The Jonge Klassina*, 5 Rob. 297.)

A licence granted by an ally in the war will, as to all innocent articles of commerce, protect the dealings of her subjects with the enemy, without any express permission from any of her allies; but in articles that are contraband of war the rule is otherwise, because the common cause may be directly and materially injured by such traffic. (Lord Stowell, in *The Neptunus*, 6 Rob. 403.)

A licence granted to trade with the enemy will cover the enemy's ship in which the goods licensed to be imported are transmitted. In *Kensington* v. *Inglis* (8 East, 273) it was held, on this principle, that where a certain trading with an alien enemy for specie and goods to be brought from the enemy's country in his ships into our colonial ports, was licensed by the king's authority, an insurance on the enemy's ship, as well as on the goods and specie put

on board for the benefit of the British subjects, was incidentally legalized; and that it was competent for the British agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war; the trust not contravening any rule of law or of public policy, and there being no personal disability in the plaintiff on the record to sue. "The king's licence," however, Lord Ellenborough added, "cannot have the effect of removing the personal disability of an alien enemy, so as to enable him to sue in his own name. But an alien, residing in this country with the king's permission, may, in such case, sue in his own name." In the case of *Usparicha* v. *Noble* (3 East, 332), it was held accordingly, that a native Spaniard, domiciled here in time of war between this country and Spain, having been licensed in general terms by the king to ship goods in a neutral vessel from hence to certain ports in Spain, such commerce was legalized for all purposes of its due and effectual prosecution, either for the benefit of the party himself, or of his correspondents, though residing in the enemy's country; and that he may insure such goods, either on his own account, or as agent for his correspondents, and recover upon such policy, in his own name, in case of loss.

A licence must be granted in a natural and intelligible form, so as not to keep the parties in the dark as to its extent. Thus, in *The Juno* (2 Rob. 117), Lord Stowell held a licence to the ports of the Vlie included Amsterdam, one of those ports. "I shall hold," said his lordship, "that if a licence is given to go through the Vlie, it is not substantially violated by going through another passage, unless it is shown to

me that it contained some specific prohibition as to other passages; supposing it to have been honestly obtained for Amsterdam through the Vlie, I shall not hold it to have been a material deviation to go another way, unless some special prohibition, or unless some special inconvenience, is shown which the party was bound to take notice of."

There are cases in which the court will deal with captured goods, as though a licence had been given, where the circumstances may be taken as virtually amounting to a licence, inasmuch as, if a licence had been applied for, it must have been granted. (*The Madonna delle Grazie*, 4 Rob. 195.) A licence, by its very nature, is calculated to subsist only during the continuance of the war in which it was granted. "Peace having been concluded," says Lord Stowell, in *The Planters Wensch* (5 Robinson, 22), "a licence is necessarily done away and destroyed, having no subject matter to act upon."

Dispensations from the general prohibition to trade with the enemy, that affect whole classes of cases, as dispensations by licence affect individuals, are granted from time to time, as the exigencies of the case shall require, by the sovereign, with the advice of the privy council, and are promulgated by proclamation, as orders in council. "The fundamental principle on which this new system of commercial policy is founded," said Lord Brougham in his great speech on Orders in Council and the Licence Trade (March 3, 1812), "has always professed itself to be a retaliating principle."

The power to make these orders of council, and to grant licences in pursuance of them, being derived

from special acts of parliament, is of a limited nature, and cannot be extended further than the acts themselves permit. The construction of licences granted by virtue of the King's prerogative will in general be applicable to licences founded on these statutes.

"It is the duty of this court," said Lord Stowell, in *The Rose in Bloom* (1 Dodson, 57), "to enforce the observation of the orders in council against all breaches whatever, and to apply them to every case of a commercial nature, without regard to the extent of the particular transaction, whether it be great or small, whether it comprises the whole or the part of a cargo, unless the amount in value shall appear to be so very trifling as to bring it within the maxim *De minimis non curat lex.* Carrying a part of a cargo only will afford no protection against the penalties enforced by this order; since the mischief would in that case be substantially, or at least eventually, the same, as if permission were granted to take whole cargos. The restrictions which it was the object of the order to impose upon the trade of the enemy would, in fact, be no restrictions at all, if such a laxity of interpretation were once admitted."

PRIZE.

The right to all captures, from the earliest times, has vested primarily in the sovereign, and no individual can have any interest in a prize, whether made by a public or by a private armed vessel, except that which he receives from the bounty of the state. (Valin, Com. ii. 235; Bynk. c. 17; Sir L. Jenkins' Works, 714.) "Prize," said Lord Stowell, in *The Elsebe* (5 Rob. 181), "is altogether a creature of the crown. No man has, or can have, any interest, but what he takes as the mere gift of the crown; beyond the extent of that gift he has nothing. This is the principle of law on the subject and founded on the wisest reasons. The right of making war and peace is exclusively in the crown; the acquisitions of war belong to the crown; and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject, *bello parta cedunt reipublicæ*. It is not to be supposed that this wise attribute of sovereignty is conferred without reason; it is given for the purpose assigned, that the power to whom it belongs to decide on peace or war, may use it in the most beneficial manner for the purposes of both. A general presumption arising from these considerations is, that the government does not mean to divest itself of this universal attribute of sovereignty, unless it is clearly and unequivocally so expressed. In conjunction with this universal presumption must be taken also the wise policy of our own

peculiar law, which interprets the grants of the crown in this respect by other rules than those which are applied in the construction of the grants to individuals. Against an individual, it is presumed that he meant to convey a benefit with the utmost liberality that his words will bear. It is indifferent to the public in which person an interest remains, whether in the grantor or taker. With regard to the grant of the sovereign it is far otherwise. It is not held by the sovereign himself as private property; and no alienation shall be presumed, except that which is clearly and indisputably expressed." (See also *Thurgar* v. *Morley*, 3 Merivale, 20.)

In order to explain the law relating to prize, it is necessary in the first instance to describe the office of Lord High Admiral, to which are attached those perquisites which are known by the designation of droits of Admiralty.

The government of the navy has been immemorially vested in the Lord High Admiral, who is a great officer of state, presiding over maritime affairs. When this office is not conferred upon a subject, or when it becomes vacant by his death or resignation, the sovereign for the time being is *ex-officio* Lord High Admiral. When the office is so vested in the sovereign, it is the usual practice to issue a commission to certain persons to execute the duties of the office, and these commissioners are called the Lords of the Admiralty. William the Fourth, when Duke of Clarence, was the last Lord High Admiral, and on his appointment an act (7 & 8 Geo. 4, c. 65) was passed to define and regulate the powers of the Lord High Admiral and his council. The duties of the Lord High Admiral

were formerly judicial as well as administrative; but the criminal jurisdiction of the Admiralty in matters not concerning the discipline of the navy, has been transferred to the courts of common law (4 & 5 Will. 4, c. 36; 7 & 8 Vict. c. 2); and the civil jurisdiction has been transferred to the Judge of the Admiralty, who receives his appointment by commission or by letters patent under the great seal, and is an officer of the crown.

Lords Commissioners of the Admiralty were first created in Nov. 1632; but their powers were not defined until the act of the 2 & 3 William & Mary, c. 2, which declared "that all powers which by act of parliament or otherwise belonged to the Lord High Admiral for the time being, had always appertained to, and might be enjoyed, used and exercised by the commissioners for executing that office, according to their commissions, to all intents and purposes, as if the commissioners were Lord High Admiral of England." The commissioners possess the patronage of all such places and emoluments as would otherwise belong to the Lord High Admiral. The commissioners generally consist of a first lord and several junior lords, two at least of the lords being naval officers; but the first lord (invariably a cabinet minister) practically exercises all the power and authority of the whole board. The commissioners exercise general control over all matters connected with the naval service of the country; and by the Annual Marine Mutiny Act, the Lord High Admiral or the Lords Commissioners may make articles for the regulation of the Royal Marine forces while on shore. (16 & 17 Vict. c. 10.) Governors of colonies are,

by their commissions, vice-admirals within their respective provinces, and fulfil in that character, as circumstances may require, many of the functions which in this country belong to the Lord High Admiral or the Board of Admiralty.

"The rights of the Lord High Admiral," says Lord Stowell, in *The Rebekah* (1 Rob. 229), "are of great antiquity and splendour; and are entitled to great attention and respect; and certainly to full as much in this Court as in any other place where they can possibly come under consideration. At the same time it is not to be understood that an extension of these rights beyond their absolute limits is to be favoured by construction; they are parts and parcels of the ancient rights of the crown communicated by former grants to that great officer, under a very different state and administration of his office from that which now exists in practice.

"All grants of the crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants, and upon this just ground, that the prerogatives and rights and emoluments of the crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away. The grant to the Lord High Admiral (evidenced as it is by the orders in council of 1665, and by the subsisting practice) gives him the benefit of all captures by whomsoever made, whether commissioned or non-commissioned persons, under certain circumstances

of situation and locality, that is, of all ships and goods coming into ports, creeks or roads of England or Ireland, unless they come in voluntarily upon revolt, or are driven in by the King's cruizers. Usage has this to include ships and goods already come into ports, creeks or roads, and these not only of England and Ireland, but of all the dominions thereunto belonging."

The grant to the Lord High Admiral, whatever it conveys, carries with it a total and perpetual alienation of the rights of the crown. They are gone for ever and separated from the crown, and nothing short of an act of parliament can restore them; whereas the grant to captors is nothing more than a mere temporary transfer of the beneficial interest. The crown would not be chargeable with a violation of any public law, if it did not issue the grant; and though the practice of issuing it after the commencement of every war has been so constant in later times as to authorize the expectation of the continuance, it still is to be considered as the occasional act of the crown's bounty, by which not the right, but the mere beneficial interest of prize is conveyed for a time, but to return to the crown and there to remain till again conveyed by a fresh act of royal liberality. Against such captors, standing on an interest of that species, the construction is the same as it would be against the crown itself, because they cannot be pronounced against without pronouncing in effect that a perpetual alienation of the crown's right to prize, taken under such circumstances, had already been made to the Lord High Admiral. (*The Marie Francoise*, 6 Rob. 282.)

The right which is usually granted by the crown

under orders in council, and proclamations authorizing the capture of enemy's property, may be limited and relaxed by the same authority. In *The Elsebe* (*ub. sup.*), Lord Stowell decided, that up to the period of final condemnation by the Court of Admiralty, the crown could, by virtue of its prerogative, restore a prize to the enemy from whom it had been captured, without the consent of the captors, or even consulting them in any way whatever. The learned judge added, that these instances were of rare occurrence, and, speaking with due reverence, ought to be of rare occurrence, as where the detention of the vessel might be detrimental to the general interests of the country. (See also *Stirling* v. *Vaughan*, 11 East, 619.)

The King holds the office of Lord High Admiral in a capacity distinguishable from his regal character; besides, although he is undoubtedly the fountain of prize, he has conveyed away his interest in it to various persons: to the commanders and crews of his own ships; to his other subjects by letters of marque; and to the Lord High Admiral of England. (*The Mercurius*, 1 Rob. 81.) "As long as the office of Lord High Admiral continues in this kingdom to have a legal existence," said Lord Stowell, in *The Gertruyda* (2 Rob. 218), "it is extremely proper that the droits and perquisites of the office should continue as anciently distinguished; and it is fit that they should be strictly determined, and with as much exact observance of the ancient rules, as if the proceeds were carried in the ancient and distinct course. Among these rules I take it to be an established maxim that the rights of the Lord High Admiral are to be considered as rights *stricti juris*, as rights

originally granted, in derogation of those higher rights of the crown which are vested in the crown for general utility; such grants are to be construed strictly on the known presumption that the crown has not parted with any right which the public wisdom has conferred upon it, farther than the express words of the grant (of 1665) import."

The grant in question is recognized in the order of council of Charles the Second, and thus defines the rights of the Lord High Admiral:—

"Whereas, through the long intermission of any war at sea by his Majesty's authority, several doubts have arisen concerning certain rights of the Lord High Admiral in time of hostility, the determination whereof appearing very necessary for the direction as well of his Majesty's officers as of those of the Lord High Admiral; upon full hearing and debate of the particulars hereafter mentioned, the King's counsel, learned in the common law, and likewise the judge of the High Court of Admiralty, and those of his Majesty's and his Royal Highness the Lord High Admiral's counsel in the said High Court of Admiralty, being present, his Majesty, present in council, was pleased to declare:

"1st. That all ships and goods belonging to enemies, coming into any port, creek or road of this his Majesty's kingdom of England or of Ireland, by stress of weather or other accident, or by mistake of port, or by ignorance, not knowing of the war, do belong to the Lord High Admiral; but such as shall voluntarily come in, either men-of-war or merchantmen, upon revolt from the enemy, and such as shall be driven in and forced into port by the King's men-

of-war, and also such ships as shall be seized in any of the ports, creeks or roads of this kingdom or of Ireland, before any declaration of war or reprisals by his Majesty, do belong unto his Majesty.

"2nd. That all enemies' ships and goods casually met at sea, and seized by any vessel not commissionated, do belong to the Lord High Admiral.

"3rd. That salvage belongs to the Lord High Admiral for all ships rescued.

"4th. That all ships forsaken by the company belonging to them are the Lord High Admiral's, unless a ship commissionated have given the occasion to such dereliction, and the ship so left be seized by such ship pursuing, or by some other ship commissionated, then in the same company, and in pursuit of the enemy; and the like is to be understood of any goods thrown out of any ship pursued."

"It appears," said Lord Stowell (*The Marie Francoise, ub. sup.*), "from the tenor of this order, that the distinction between the admiral and rights of the crown is founded in this: that when vessels come in not under any motive arising out of the occasions of war, but from distress of weather, or want of provisions, or from ignorance of war, and are seized in port, they belong to the Lord High Admiral; but where the hand of violence has been exercised upon them, where the impression arises from acts connected with war, from revolt of their own crew, or from being forced or driven in by the king's ships, they belong to the crown. This is the broad distinction which is laid down in the order of council, and which has since been invariably observed."

The grant to the Lord High Admiral has been held

to extend to the British possessions in India, to St. Helena, and to other transmarine dependencies of the British crown. (*The Marie Francoise, ub. sup.*; *The Trusty*, 4 Rob. 324, note.)

The rights, however, of the Lord High Admiral do not extend to vessels seized on coming into foreign ports, or to any coming in anywhere other than during a subsisting war. (*The Gertruyda*, 2 Rob. 219.) So, in *The Marie Francoise* (*ub. sup.*), where an enemy's ship, having sailed prior to hostilities, having been captured and brought into an English port, but released, and being, while lying in the port, again seized, the claim of the Lord High Admiral to the ship as a droit seized in port, was rejected, on the ground that the ship had been forced in by warlike operations, and not driven in by circumstances unconnected with the war, or in ignorance of it.

Title to sea-prize, being derivable only from commission under the Admiralty, the great fountain of maritime authority, and a military force on land having no such authority, "a capture at sea," said Lord Stowell, in *The Rebekah* (1 Rob. 235), "made by a force upon the land (which is a case certainly possible, though not frequent) is considered generally as a non-commissioned capture, and enures to the benefit of the Lord High Admiral. Thus, if a ship of the enemy was compelled to strike by a firing from the castle of Dover, or other garrisoned fortress upon the land, that ship would be a droit of Admiralty, and the garrison must be content to take a reward from the bounty of the Admiralty, and not a prize interest under the King's proclamation. I likewise think cases may occur in which naval persons, having

a real authority to take upon the sea for their own advantage, might yet entitle the Admiralty, and not themselves, by a capture made upon the sea by the aid of a force stationed upon the land. Suppose the crew, or part of the crew of a man-of-war, were landed, and descried a ship of the enemy at sea, and that they took possession of any battery or fort on the shore, such as may be met with in many parts of the coast, and by means of such battery or fort compelled such a ship to strike: I have no doubt that such a capture, though made by persons having naval commissions, yet being made by means of a force upon the land, which they employed accidentally and without any right under their commission, would be a droit of Admiralty and nothing more. The peculiar nature and quality of the place where the capture was effected, however," said Lord Stowell, "is to be added to the consideration;" and accordingly, he adjudged as prize to the captors, the capture in question, made at the isle of Marcou, by the crews of *The Sand Fly* and *Badger*, stationed in and near that island, under circumstances thus characterized:—"There is not a person upon it who is not borne upon the ships' books, and who is not a part of their crews; they have the ship's pay, the ship's victuals, and the ship's officers to command them; the blockhouses which they have constructed are mounted with their own ship guns, with the addition of a few spare guns procured otherwise. The whole force, such as it is, upon this little spot, is entirely subservient to these vessels, and for their use, and for no other purpose, as the certificates declare. Such a place, so selected, and so employed, is hardly to be considered as anything else than as a part or appen-

dage of the naval force; it is a sort of stationary tender, rather attached to and dependent on these vessels than having the vessels attached to and dependent upon it. This peculiar character of the place distinguishes it most essentially from the case of a land fortress occupied by a military garrison."

As to the term road, in relation to the droits of the Admiralty, "A road," says Lord Stowell, in *The Marie Francoise* (*ub. sup.*), "must at least be so connected with the common uses of the port as to constitute a part of the port, in which the capture is alleged to have been made. We all know that there are roads along many parts of the coasts of this kingdom which make no part of any port. The port of Yarmouth is very different from the roads of Yarmouth; and I am not aware of any case in which a ship lying merely at anchor in a road, without being protected by points of lands, has been held to support a claim of this nature on the part of the Admiralty. It is not enough that ships should anchor there for a short stay. It must, I conceive, be the place where vessels not only arrive but take up their station for the purpose of unlivering their cargos in the ordinary course of commerce."

"Every anchorage," said Lord Stowell, in *The Rebekah* (*ub. sup.*), "is not a roadstead. A roadstead is a known general station for ships—*statio tutissima nautis*—notoriously used as such, and distinguished by the name, and not every spot where an anchor will find bottom and fix itself. The very expression of 'coming into a road' shows that by road is meant something much beyond mere anchorage ground on an open coast. When it was laid down in *The Traut-*

mansdorff (Lords, August 1st, 1795), that it was not necessary that the ship should be actually entered, and that it was enough if she was *in ipsis faucibus* of the port, creek or road, it is evident that the words 'ports, creeks or roads,' have a signification intimating certain known receptacles of ships, more or less protected by points or headlands, and marked out by limits, and resorted to as places of safety.

"The distinction of law, as to droits of Admiralty and Admiralty prize of vessels in a port, river or creek, has been long clearly established; that all vessels detained in port, and found there at the breaking out of hostilities, are condemned *jure coronæ* to the king, and that all coming in after hostilities, not voluntarily by revolt, but ignorant of the fact, are to be condemned as droits of Admiralty." (*The Gertruyda*, ub. sup.)

Ships seized in the harbour of an island conquered and taken possession of by British forces, are condemnable as droits of Admiralty, though the conquest of the island may not have been confirmed to Great Britain by a treaty of peace. A ship and cargo were seized in December, 1811, whilst lying at anchor in the roadstead of Heligoland, which island had been surrendered to his Majesty's forces on the 5th of September, 1807. Lord Stowell said, "The locality of the transaction is sufficiently described by the term harbour, which must be understood to mean that portion of the sea to which vessels are carried for the purpose of landing their cargos at Heligoland; and whether the same portion of sea is more or less inclosed, whether it is completely land-locked or not, does not appear to be material to the issue in the present

case. The Gazette describes the place as a haven, a compliment to which it is certainly not in strictness entitled; but it is used as a haven, and may, therefore, fairly be considered as such, at least for the purposes of the present question. There is certainly no reason for saying that the property is not within the grant of the crown to the Lord High Admiral, so far as the locality of the seizure is concerned; for it is the ordinary rule, that ships taken in such places during the existence of hostilities, become droits of the Admiralty. A doubt was suggested during the argument, whether at the time the seizure was made, Heligoland formed part of the dominions of the crown of Great Britain or not. The island had been conquered and taken possession of by British forces, but the conquest had not been confirmed to this country by a treaty of peace. It was a firm capture in war, but was still subject to a kind of latent title in the enemy by which he might have recovered it at the conclusion of the war, provided this country would have consented to its restitution. It is somewhat extraordinary, that in the course of the numerous and long wars in which this country has been engaged, no case should have been determined which might serve as a guide to the court in the decision of the present question. The grant from the crown to the Lord High Admiral applies to the king's dominions generally, and there is nothing which points to a distinction between these parts of the king's dominions over which the crown has *plenum dominium* or otherwise. No point is more clearly settled in the courts of common law, than that a conquered country forms immediately part of the king's dominions. (*Campbell* v. *Hall*, Cowp. 208.) In a late instance

we know that an island so acquired (Guadaloupe) was transferred to a third power, subject undoubtedly to the shadowy right of the former proprietor. It is said that a conquest of this kind may be re-acquired *flagranti bello*, by the state from which it was taken, but so may any other possession, though forming part of the original and established dominions of the crown of this country, if the enemy has it in his power to make the conquest. The same observation is applicable to the Isle of Wight, as well as to Heligoland, for the enemy has the same right to make a conquest of the one as the other. It is said that the enemy may recover back the island of Heligoland when peace takes place; but it is equally true that the conqueror may retain it if he can, and, if nothing is said about it in the treaty, it remains with the possessor, whose title cannot afterwards be called in question. The distinction between the two species of territories is, in fact, rather more formal than substantial, at least I must profess my inability to see any distinction between them that can materially affect the present question. The power of the British government was full and complete; and though the Lords Commissioners of the Admiralty might not have interposed the particular authority with which they are invested, yet the crown had exercised its authority." (*The Foltina*, 1 Dod. 450.)

Under 1 Will. 4, c. 25, s. 1, and 1 Vict. c. 1, s. 2, droits of Admiralty are, with other hereditary revenues of the crown, to be transferred to the consolidated fund, in aid of the civil list, provision being made thereout for rewards to captors.

In the United States there are not, strictly speaking,

any such things as droits of Admiralty. The sole and exclusive right to all prizes vests in the government, and no individual can acquire any interest therein, unless under their grant and commission; and all captures, therefore, made without such grant and commission, enure to the government by virtue of its general prerogative, the government in such case not taking the property as droits of admiralty, but strictly and technically *jure reipublicæ*. (*The Joseph*, 1 Gale, 558.)

The general principles regulating the distribution of prize were thus laid down by Lord Stowell and the late Sir John Nicholl, to Mr. Jay, the American minister, in a letter dated Sept. 10th, 1794, which has hitherto only appeared in the valuable American edition of Sir C. Robinson's Reports:—

"By the maritime law of nations, universally and immemorially received, there is an established method of determination, whether the capture be or be not lawful prize.

"Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon as prize, in a court of Admiralty, judging by the law of nations and treaties.

"The proper and regular court for these condemnations is the court of that state to whom the captor belongs.

"The evidence to acquit or condemn, with or without costs or damages, must, in the first instance, come merely from the ship taken, viz., the papers on board, and the examination on the oath of the master, and other principal officers; for which purpose there are officers of Admiralty in all the considerable seaports of every maritime power at war, to examine the captains

and other principal officers of every ship, brought in as a prize upon general and impartial interrogatories.[1] If there do not appear from thence ground to condemn as enemy property, or contraband goods going to the enemy, there must be an acquittal, unless from the aforesaid evidence the property shall appear so doubtful that it is reasonable to go into farther proof thereof.

"A claim of ship or goods must be supported by the oath of somebody, at least as to belief.

"The law of nations requires good faith. Therefore every ship must be provided with complete and genuine papers; and the master at least should be privy to the truth of the transaction.

"To enforce these rules, if there be false or colourable papers, if any papers be thrown overboard, if the master and officers examined *in preparatorio*, grossly prevaricate, if proper ship's papers are not on board, or if the master and crew cannot say whether the ship or cargo be the property of a friend or enemy, the law of nations allows, according to the different degrees of misbehaviour or suspicion, arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received by the claimant, in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages. For which purpose all privateers are obliged to give security for their good behaviour; and this is referred to, and expressly stipulated by many treaties.

"Though from the ship's papers and the preparatory

[1] For the form of interrogatories exhibited, see C. Robinson's Reports, Vol. 1, Appendix.

examinations, the property does not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits to supply that defect. If he will not show the property by sufficient affidavits to be neutral, it is presumed to belong to the enemy. Where the property appears from evidence not on board the ship, the captor is justified in bringing her in, and excused paying costs, because he is not in fault; or, according to the circumstances of the case, may be justly entitled to receive his costs.

"If the sentence of the Court of Admiralty is thought to be erroneous, there is in every maritime country a superior Court of Review, consisting of the most considerable persons, to which the parties who think themselves aggrieved may appeal; and this superior court judges by the same rule which governs the Court of Admiralty, viz., the law of nations and the treaties subsisting with that neutral power whose subject is a party before them.

"If no appeal is offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive.

"This manner of trial and adjudication is supported, alluded to, and enforced by many treaties.

"In this method all captures at sea were tried during the last war by Great Britain, France, and Spain, and submitted to by the neutral powers. In this method, by Courts of Admiralty acting according to the law of nations, and particular treaties, all captures at sea have immemorially been judged of in every country in Europe. Any other method of trial would be manifestly unjust, absurd, and impracticable.

"Such are the principles which govern the proceedings in the prize courts.

"The following are the measures which ought to be taken by the captor, and by the neutral claimant, upon a ship and cargo being brought in as a prize. The captor, immediately upon bringing his prize into port, sends up or delivers upon oath to the registry of the Court of Admiralty, all papers found on board the captured ship. In the course of a few days the examinations in preparatory of the captain and some of the crew of the captured ship are taken upon a set of standing interrogatories, before the commissioners of the port to which the prize is brought, and which are also forwarded to the registry of the Admiralty as soon as taken. A monition is extracted by the captor from the registry, and served upon the Royal Exchange, notifying the capture, and calling upon all persons interested to appear and show cause, why the ship and goods should not be condemned. At the expiration of twenty days the monition is returned into the registry with a certificate of its service; and if any claim has been given, the cause is then ready for hearing, upon the evidence arising out of the ship's papers, and preparatory examinations. The measures taken on the part of the neutral master or proprietor of the cargo are as follows:—Upon being brought into port, the master usually makes a protest which he forwards to London, as instructions (or with such further directions as he thinks proper) either to the correspondent of his owners, or to the consul of his nation, in order to claim the ship and such parts of the cargo as belong to his owners, or with which he was particularly intrusted: or the master himself, as soon as he has undergone

his examination, goes to London to take the necessary steps.

"The master, correspondent, or consul applies to a proctor, who prepares a claim supported by an affidavit of the claimant, stating briefly to whom, as he believes, the ship and goods claimed belong; and that no enemy has any right or interest in them. Security must be given to the amount of sixty pounds, to answer costs, if the case should appear so grossly fraudulent on the part of the claimant as to subject him to be condemned therein.

"If the captor has neglected in the meantime to take the usual steps (but which seldom happens, as he is strictly enjoined, both by his instructions and by the Prize Act, to proceed immediately to adjudication), a process issues against him on the application of the claimant's proctor, to bring in the ship's papers and preparatory examinations, and to proceed in the usual way.

"As soon as the claim is given, copies of the ship's papers and examinations are procured from the registry, and upon the return of the monition the cause may be heard. It, however, seldom happens (owing to the great pressure of business, especially at the commencement of a war) that causes can possibly be prepared for hearing immediately upon the expiration of the time for the return of the monition. In that case, each cause must necessarily take its turn. Correspondent measures must be taken by the neutral master if carried within the jurisdiction of a Vice-Admiralty Court, by giving a claim supported by his affidavit, and offering security for costs, if the claim should be pronounced grossly fraudulent.

"If the claimant be dissatisfied with the sentence, his proctor enters an appeal in the registry of the court where the sentence was given, or before a notary public (which regularly should be entered within fourteen days after the sentence), and he afterwards applies at the registry of the Lords of Appeal in prize causes (which is held at the same place as the registry of the High Court of Admiralty) for an instrument called an inhibition, and which should be taken out within three months if the sentence be in the High Court of Admiralty, and within nine months if in a Vice-Admiralty Court, but may be taken out at later periods, if a reasonable cause can be assigned for the delay that has intervened. This instrument directs the judge, whose sentence is appealed from, to proceed no further in the cause. It directs the registrar to transmit a copy of all the proceedings of the inferior court; and it directs the party who has obtained the sentence to appear before the superior tribunal to answer to the appeal. On applying for this inhibition, security is given on the part of the appellant to the amount of two hundred pounds to answer costs, in case it should appear to the Court of Appeals that the appeal is merely vexatious. The inhibition is to be served upon the judge, the registrar, and the adverse party and his proctor, by showing the instrument under seal, and delivering a note or copy of the contents. If the party cannot be found, and the proctor will not accept the service, the instrument is to be served '*viis et modis*,' that is, by affixing it to the door of the last place of residence, or by hanging it upon the pillars of the Royal Exchange. That part of the process above described, which is to be

executed abroad, may be performed by any person to whom it is committed, and the formal part at home is executed by the officer of the court. A certificate of the service is indorsed upon the back of the instrument, sworn before a surrogate of the superior court, or before a notary public, if the service is abroad. If the cause be adjudged in a Vice-Admiralty Court, it is usual, upon entering an appeal there, to procure a copy of the proceedings, which the appellant sends over to his correspondent in England, who carries it to a proctor, and the same steps are taken to procure and serve the inhibition, as where the cause has been adjudged in the High Court of Admiralty. But if a copy of the proceedings cannot be procured in due time, an inhibition may be obtained by sending over a copy of the instrument of appeal, or by writing to the correspondent an account only of the time and substance of the sentence.

"Upon an appeal fresh evidence may be introduced, if, upon hearing the cause, the Lords of Appeal shall be of opinion that the case is of such doubt as that further proof ought to have been ordered by the court below.

"Further proof usually consists of affidavits made by the asserted proprietors of the goods, in which they are sometimes joined by their clerks and others acquainted with the transaction, and with the real property of the goods claimed. In corroboration of these, affidavits may be annexed, original correspondence, duplicates of bills of lading, invoices, extracts from books, &c. These papers must be proved by the affidavits of persons who can speak to their authen-

ticity; and, if copies or extracts, they should be collated and certified by public notaries. The affidavits are sworn before the magistrates or others competent to administer oaths in the country where they are made, and authenticated by a certificate from the British consul.

"The degree of proof to be required depends upon the degree of suspicion and doubt that belongs to the case. In cases of heavy suspicion and great importance, the court may order what is called 'plea and proof,' that is, instead of admitting affidavits and documents introduced by the claimants only, each party is at liberty to allege in regular pleadings such circumstances as may tend to acquit or to condemn the capture, and to examine witnesses in support of the allegations, to whom the adverse party may administer interrogatories. The depositions of the witnesses are taken in writing; if the witnesses are to be examined abroad, a commission issues for that purpose; but in no case is it necessary for them to come to England. These solemn proceedings are not often resorted to. Standing commissions may be sent to America for the general purpose of receiving examinations of witnesses in all cases where the court may find it necessary for the purposes of justice to decree an inquiry to be conducted in that manner.

"With respect to captures and condemnations at Martinico, which are the subjects of another inquiry contained in your note, we can only answer in general, that we are not informed of the particulars of such captures and condemnations; but as we know of no legal Court of Admiralty established at Martinico, we are

clearly of opinion that the legality of any prizes taken there must be tried in the High Court of Admiralty of England, upon claims given, in the manner above described, by such persons as may think themselves aggrieved by the said captures.

"(Signed) WILLIAM SCOTT.
JOHN NICHOLL."

From prize causes, whether in the Vice-Admiralty Courts, or in the Court of Admiralty in England, the appeal lies directly to certain commissioners of appeal in prize causes, who are appointed by the crown under the great seal, and are usually members of the Privy Council, and whose appointment is generally regulated or recognized by treaties with foreign nations.

In the United States of America, the original jurisdiction in prize cases is in the district or circuit courts, the appeal being from the district to the circuit court, and from the circuit court to the supreme court of the United States. In France the jurisdiction in these cases belonged from the earliest times to the admiral, with an appeal to the Supreme Council; but in 1659, a standing commission of councillors of state and *maîtres des requêtes* was established to assist the admiral, under the title of *Conseil des Prises*, with a further appeal to the Council of State, and thence to the Royal Council of Finance. (Valin, Com., b. 3, c. 9, s. 21.)

Condemnation is a function which must be exercised by the tribunals of the law of nations within the belligerent country. (*The Flad Oyen*, 1 Rob. 134.) "It cannot be presumed," said his lordship, "that

a neutral government would so far depart rom the duties of neutrality as to permit the exercise of that last and crowning act of hostility—if I may so express myself—the condemnation of the property of one belligerent to the other; thereby confirming and securing him in the acquisition of his enemy's property by hostile means." But this will not hold good with respect to condemnations passed on ships brought into the ports of an ally in the war. (*The Christopher*, 2 Rob. 210; *The Henrick and Maria*, 4 Rob. 53.).

"Head-money," said Lord Stowell, in *La Gloire* (Edw. 280), "is, according to the principle which is recognized in this and the Superior Court, the peculiar and appropriate reward of immediate personal exertion, and consequently wherever any claim to participate in a bounty so appropriated has been advanced, it has always been considered in a more rigid manner by the courts than those which arise out of the general interests of prize. There are some very ancient cases in which the question has been decided, in the case of *The Superb*, in the case of *The Duchess Anne*, and also in the case of *The Toulouse*, it which it appears by a note of that judgment communicated to me by a very eminent person of great experience and of the longest practice in these courts, that the prize was condemned to one man-of-war as actual captor, and to two others as assisting at the capture, but the bounty money was ordered to be paid only to the actual captor, the others not being actually engaged with the prize. This is the invariable rule which for more than a century has been applied to

cases of this description, and therefore the circumstances must be of a very peculiar nature to induce the court to recede from a practice so long and so universally established."

"The Court," said Lord Stowell in *Le Francha* (1 Rob. 157), "in no case whatever directly pronounces head-money to be due; it goes no further than to intimate its opinion, by declaring the number of persons who were on board at the time of the engagement. But the commissioners, who are to pay the head-money where due, are not, that I know of, bound to pay at all on the opinions so intimated; though if they do pay, they are bound by the declaration of numbers made by the court."

Head-money is not due, under the 45 Geo. 3, c. 72, to conjunct forces of the army and navy, in ships captured by such forces, unless the army acted on the occasion in a naval capacity, soldiers not being recognized in that statute as grantees, except when clothed with a naval character, by serving on board ship. (*La Bellone*, 2 Dod. 349; see also *Two Piratical Gun-Boats*, 2 Hagg. 408; *Several Dutch Schuyts*, 6 Rob. 48; *The San Joseph*, ib. 331; *L'Hercule*, 1 Hagg. 211—which was an application for head-money by five Capuchin friars; *The Santa Brigata*, 3 Rob. 56; *The Matilda*, 1 Dod. 367; *L'Alerte*, 6 Rob. 242; *The Clorinde*, 1 Dod. 439; *The Babillon*, Edw. 39; *L'Elise*, 1 Dod. 442; *The Uranie*, 2 Dod. 172; *La Lune*, 1 Hagg. 210; *The Ville de Varsovie*, 2 Dod. 303; *The El Rayo*, 1 Dod. 45.)

In all cases of prize, as Lord Stowell expressed it, "the words of the royal proclamation are the title

deeds of flag officers, and no naval officer can by law claim an interest in prize unless it falls clearly within the provisions of the proclamation in force for the time being." The prize proclamation issued for the present war is given in the Appendix, No. 2.

APPENDIX.

I.

THE DECLARATION OF WAR.

(From the Supplement to the *London Gazette* of Tuesday, March 28, 1854.)

DECLARATION.

It is with deep regret that her Majesty announces the failure of her anxious and protracted endeavours to preserve for her people and for Europe the blessings of peace.

The unprovoked aggression of the Emperor of Russia against the Sublime Porte has been persisted in with such disregard of consequences, that after the rejection by the Emperor of Russia of terms which the Emperor of Austria, the Emperor of the French, and the King of Prussia, as well as her Majesty, considered just and equitable, her Majesty is compelled by a sense of what is due to the honour of her crown, to the interests of her people, and to the independence of the states of Europe, to come forward in defence of an ally whose territory is invaded, and whose dignity and independence are assailed.

Her Majesty, in justification of the course she is about to pursue, refers to the transactions in which her Majesty has been engaged.

The Emperor of Russia had some cause of complaint against the Sultan with reference to the settlement, which his Highness had sanctioned, of the conflicting claims of the Greek and Latin churches to a portion of the Holy Places of Jerusalem and its neighbourhood. To the complaint of the Emperor of Russia on this head justice was done, and her Majesty's Ambassador at Constantinople had the satisfaction of promoting an arrangement to which no exception was taken by the Russian government.

But, while the Russian government repeatedly assured the government of her Majesty that the mission of Prince Menschikoff to Constantinople was exclusively directed to the settlement of the question of the Holy Places at Jerusalem, Prince Menschikoff himself pressed upon the Porte other demands of a far more serious and important character, the nature of which he in the first instance endeavoured, as far as possible, to conceal from her Majesty's Ambassador. And these demands,

thus studiously concealed, affected not the privileges of the Greek Church at Jerusalem, but the position of many millions of Turkish subjects in their relations to their sovereign the Sultan.

These demands were rejected by the spontaneous decision of the Sublime Porte.

Two assurances had been given to her Majesty—one, that the mission of Prince Menschikoff only regarded the Holy Places; the other, that his mission would be of a conciliatory character.

In both respects her Majesty's just expectations were disappointed.

Demands were made which, in the opinion of the Sultan, extended to the substitution of the Emperor of Russia's authority for his own over a large portion of his subjects, and those demands were enforced by a threat; and when her Majesty learnt that, on announcing the termination of his mission, Prince Menschikoff declared that the refusal of his demands would impose upon the Imperial Government the necessity of seeking a guarantee by its own power, her Majesty thought proper that her fleet should leave Malta, and, in co-operation with that of his Majesty the Emperor of the French, take up its station in the neighbourhood of the Dardanelles.

So long as the negotiation bore an amicable character her Majesty refrained from any demonstration of force. But when, in addition to the assemblage of large military forces on the frontier of Turkey, the Ambassador of Russia intimated that serious consequences would ensue from the refusal of the Sultan to comply with unwarrantable demands, her Majesty deemed it right, in conjunction with the Emperor of the French, to give an unquestionable proof of her determination to support the sovereign rights of the Sultan.

The Russian government has maintained that the determination of the Emperor to occupy the principalities was taken in consequence of the advance of the fleets of England and France. But the menace of invasion of the Turkish territory was conveyed in Count Nesselrode's Note to Redshid Pasha of the 19th (31st) of May, and re-stated in his despatch to Baron Brunow of the 20th of May (1st of June), which announced the determination of the Emperor of Russia to order his troops to occupy the principalities, if the Porte did not within a week comply with the demands of Russia.

The despatch to her Majesty's Ambassador at Constantinople, authorizing him in certain specified contingencies to send for the British fleet, was dated the 31st of May, and the order sent

direct from England to her Majesty's Admiral to proceed to the neighbourhood of the Dardanelles was dated the 2nd of June.

The determination to occupy the principalities was therefore taken before the orders for the advance of the combined squadrons were given.

The Sultan's minister was informed that unless he signed within a week, and without the change of a word, the note proposed to the Porte by Prince Menschikoff on the eve of his departure from Constantinople, the principalities of Moldavia and Wallachia would be occupied by Russian troops. The Sultan could not accede to so insulting a demand; but, when the actual occupation of the principalities took place, the Sultan did not, as he might have done in the exercise of his undoubted right, declare war, but addressed a protest to his allies.

Her Majesty, in conjunction with the Sovereigns of Austria, France, and Prussia, has made various attempts to meet any just demands of the Emperor of Russia without affecting the dignity and independence of the Sultan; and, had it been the sole object of Russia to obtain security for the enjoyment by the Christian subjects of the Porte of their privileges and immunities, she would have found it in the offers that have been made by the Sultan. But, as that security was not offered in the shape of a special and separate stipulation with Russia, it was rejected. Twice has this offer been made by the Sultan, and recommended by the four powers, once by a note originally prepared at Vienna, and subsequently modified by the Porte, once by the proposal of bases of negotiation agreed upon at Constantinople on the 31st of December, and approved at Vienna on the 13th of January, as offering to the two parties the means of arriving at an understanding in a becoming and honourable manner.

It is thus manifest that a right for Russia to interfere in the ordinary relations of Turkish subjects to their sovereign, and not the happiness of Christian communities in Turkey, was the object sought for by the Russian government; to such a demand the Sultan would not submit, and his Highness, in self-defence, declared war upon Russia, but her Majesty, nevertheless, in conjunction with her allies, has not ceased her endeavour to restore peace between the contending parties.

The time has, however, now arrived when, the advice and remonstrances of the Four Powers having proved wholly ineffectual, and the military preparations of Russia becoming daily more extended, it is but too obvious that the Emperor of Russia has entered upon a course of policy which, if unchecked, must lead to the destruction of the Ottoman empire.

In this conjuncture her Majesty feels called upon, by regard

for an ally, the integrity and independence of whose empire have been recognized as essential to the peace of Europe, by the sympathies of her people with right against wrong, by a desire to avert from her dominions most injurious consequences, and to save Europe from the preponderance of a power which has violated the faith of treaties, and defies the opinion of the civilized world, to take up arms, in conjunction with the Emperor of the French, for the defence of the Sultan.

Her Majesty is persuaded that in so acting she will have the cordial support of her people; and that the pretext of zeal for the Christian religion will be used in vain to cover an aggression undertaken in disregard of its holy precepts, and of its pure and beneficent spirit.

Her Majesty humbly trusts that her efforts may be successful, and that, by the blessing of Providence, peace may be re-established on safe and solid foundations.

Westminster, March 28, 1854.

DECLARATION.

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an ally, is desirous of rendering the war as little onerous as possible to the powers with whom she remains at peace.

To preserve the commerce of neutrals from all unnecessary obstruction, her Majesty is willing, for the present, to wave a part of the belligerent rights appertaining to her by the law of nations.

It is impossible for her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches, and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbours, or coasts.

But her Majesty will wave the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war.

It is not her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships, and her Majesty further declares that, being anxious as much as possible to lessen the evils of war, and to restrict its operations to the regularly organised forces of the country, it is not her present intention to issue letters of marque for the commissioning of privateers.

II.

THE PRIZE PROCLAMATION.

BY THE QUEEN—A PROCLAMATION.

Victoria R.—Whereas by our Order in Council, bearing date the twenty-ninth day of March, one thousand eight hundred and fifty-four, We have ordered that general reprisals be granted against the ships, goods, and subjects of the Emperor of all the Russias, his subjects, or others inhabiting within any of his countries, territories, or dominions (save and except any vessels to which our licence has been or may be granted, or which have been directed to be released from the embargo, and have not since arrived at any foreign port), so that our fleets and ships shall and may lawfully seize all ships, vessels, and goods belonging to the Emperor of all the Russias or his subjects, or others inhabiting within any of his countries, territories, or dominions, and bring the same to judgment in any of the Courts of Admiralty within our dominions, duly authorized and required to take cognizance thereof, we do hereby order and direct that the net produce of all such prizes taken by any of our ships or vessels of war (save and except when they shall be acting on any conjunct expedition with our army, in which case we reserve to ourselves the division and distribution of all prize and booty taken, and also, save and except as hereinafter mentioned,) shall be for the entire benefit and encouragement of our flag officers, captains, commanders, and other commissioned officers in our pay; and of all subordinate warrant, petty, and non-commissioned officers, and of the seamen, marines, and soldiers on board our said ships and vessels at the time of the capture, after the same shall have been to us finally adjudged lawful prize.

Whenever any prize shall be taken by any of our fleets, squadrons, ships, or vessels of war, whilst acting in conjunction with any fleet, squadron, ships or vessels of war belonging to any other power or powers in alliance with us, our High Court of Admiralty, or the Vice-Admiralty Court within our dominions adjudicating thereon, shall apportion to such ally or allies a share or shares of the proceeds of such prize or prizes, proportionate to the number of officers and men, &c., present and employed on the part of such ally or allies, as com-

pared with the number of officers and men, &c., present and employed on our behalf in such capture or captures, without reference to their respective ranks; and the share or shares so set apart for such ally or allies shall be transmitted to such persons as may be duly authorized on behalf of such ally or allies to receive the same.

Ships or vessels being in sight of the prize, as also of the captor, under circumstances to cause intimidation to the enemy and encouragement to the captor, shall be alone entitled to share as joint captors.

After having deducted the portion set apart as aforesaid for our allies, a distribution, so far as regards her Majesty's forces, shall be as follows:—

The flag officer or officers shall have one-twentieth part of the whole net proceeds arising from prizes captured from the enemy, by any of the ships or vessels under his or their command, and of the rewards conferred for the same, according to the following conditions and modifications, save and except as hereinafter provided and directed, that is to say:—

When there is but one flag officer, he shall have the entire one-twentieth part; when two flag officers shall be sharing together, the chief shall have two-thirds, and the other flag officer shall have the remaining one-third of the one-twentieth part; and when there shall be more than two flag officers, the chief shall have one-half of the said one-twentieth part, and the remaining half shall be equally divided among the junior flag officers. Commodores of the first class, and captains of the fleet, to share as flag officers, provided always that no flag officer, unless actually on board any of our ships or vessels of war, and at the actual taking, sinking, burning, or otherwise destroying any ship or ships of war, privateer or privateers, belonging to the enemy, shall share in the distribution of any head money or bounty money granted as a reward for taking, sinking, burning, or otherwise destroying any such ship or vessel of the enemy.

That no flag officer commanding in any port in the United Kingdom shall share in the proceeds of any prize captured from the enemy, by any ship or vessel which shall sail from or leave such port by order of the Lord High Admiral, or of our Commissioners for executing the office of Lord High Admiral.

That when ships or vessels under the command of several flag officers belonging to separate stations shall be joint captors, each flag officer shall receive a proportion of the one-twentieth part, according to the number of officers and men present under the command of each such flag officer: and

when any ship or vessel under orders from the Lord High Admiral, or from our Commissioners for executing the office of Lord High Admiral, are joint captors with other ships or vessels, under a flag or flags, the like regulations as to the apportionment of the flag share to the flag officer or officers is to be observed.

With reference to flag officers, it is to be noted, that when an inferior flag officer is sent to reinforce a superior officer on any station, the superior flag officer shall not share in any prize taken by the inferior flag officer before he has arrived within the limits of that station, unless the inferior officer shall have received some order directly from, and shall be acting in execution of some order issued by, such superior flag officer.

No chief flag officer quitting any station, except upon some definite urgent service, and with the intention of returning to the station as soon as such service is performed, shall share in any prize taken by our ships or vessels left behind, after he has passed the limits of the station, or after he has surrendered the command to another flag officer appointed by the Admiralty to command in chief upon such station.

An inferior flag officer quitting any station (except when detached by orders from his commander-in-chief upon a special service, accompanied with orders to return to such station as soon as the service has been performed), shall have no share in prizes taken by the ships and vessels remaining on the station, after he has passed the limits thereof. In like manner, flag officers remaining on such station shall not share in the prizes taken by such inferior officer, or by ships or vessels under his immediate command, after he has quitted the limits of the station, except he has been detached as aforesaid.

A commander-in-chief, or other flag officer, belonging to any station shall not share in any prize or prizes taken out of the limits of that station by any ship or vessel under the command of a flag officer of any other station, or under orders from our Commissioners of the Admiralty, unless such commander-in-chief or flag officer is expressly authorized by our said commissioners to take the command of that station in which the prize or prizes is or are taken, and shall actually have taken upon him such command.

Every commodore having a captain under him shall be esteemed a flag officer with respect to the twentieth part of prizes taken, whether he be commanding in chief, or serving under command.

The first captain to the admiral and commander-in-chief of our fleet, and also the first captain to any flag officer appointed

to command a fleet of ten ships of the line or upwards, shall be deemed to be a flag officer for the purpose of sharing in prize, and shall be entitled to share therein as the junior flag officer of such fleet.

Any officer on board any of our ships of war at the time of capturing any prize or prizes, who shall have more commissions than one, shall be entitled only to share in such prize or prizes according to the share allotted to him by the above-mentioned distribution in respect to his superior commission or office.

And with reference to other officers it is to be noted—that a captain, commander, or other commanding officer of a ship or vessel, shall be deemed to be under the command of a flag officer when he shall have received some order from, or be acting in the execution of some order issued by, a flag officer, whether he be or be not within the limits of the station of such flag officer; and in the event of his being directed to join a flag officer on any station, he shall be deemed to be under the command of such flag officer from the time when he arrives within the limits of the station, which circumstance is always to be carefully noted in the log-book; and it shall be considered that he continues under the flag officer of such station until he shall have received some order directly from, or be acting in the execution of some order issued by some other flag officer, duly authorized, or by the Lord High Admiral, or our Commissioners for executing the office of Lord High Admiral.

And we hereby direct, that the captain, commander, lieutenant commanding, master commanding, or any other officer, duly commanding any ship, sloop or vessel of war, singly taking any prize from the enemy, that is to say, the officer actually in command at the time, shall have one-eighth of the remainder, or if there is no flag, one-eighth of the entire net proceeds, except that if the single capturing ship be a rated ship, having a commander under the captain, the commander shall take a portion of the one-eighth part, as if he were commander of a sloop, according to the proportion hereinafter set forth; and if more than one commanding officer of the same rank of command shall be entitled to share as joint captors, the one-eighth shall be equally divided between them; but when captains, commanders, lieutenants commanding, and masters commanding respectively our ships and vessels of war, and commanders under captains in rated ships, shall share together in whatever variety of combination, the one-eighth shall be so divided into parts for a graduated apportionment as to provide for each captain re-

ceiving six parts; each commander of a sloop, or commander under a captain in a rated ship, three parts; and each lieutenant commanding, or master commanding, or other officer actually commanding a small vessel of war, two parts; which we hereby direct shall be the proportion in which they shall respectively share; commodores of the second class and field officers of marines, or of land forces serving as marines, doing duty as field officers, above the rank of major, to share as captains; and field officers of marines, or of land forces serving as marines; and doing duty in the rank of major, to share as commander of sloops.

And we further direct, that after provision shall thus have been made for the flag share (if any), and for the portion of the commanding officer or officers, and others, as above specified, the remainder of the net proceeds shall be distributed in ten classes, so that each officer, man, and boy, composing the rest of the complements of our ships, sloops, and vessels of war, and actually on board at the time of any such capture, and every person present and assisting, shall receive shares or a share according to his class, as set forth in the following scale:—

First Class.—Master of the fleet, inspector of steam machinery afloat, when embarked with a fleet, medical inspector, or deputy medical inspector, when embarked with a fleet—45 shares each.

Second Class.—Senior lieutenants of a rated ship, not bearing a commander, under the captain, secretary to the admiral of the fleet or admiral commanding in chief—35 shares each.

Third Class.—Sea lieutenant, master, captain of marines, of marine artillery, or of land forces doing duty as marines, whether having higher brevet rank or not, secretary to an admiral, or to a commodore of the first class, not commanding in chief, chief engineer—28 shares each.

Fourth Class.—Lieutenant or quartermaster of marines, lieutenant of marine artillery, lieutenant, quartermaster, or ensign of land forces doing duty as marines, secretary to a commodore of the second class, chaplain, surgeon, paymaster, naval instructor, mate, assistant-surgeon, second master, clerk in charge, passed clerk, assistant engineer, gunner, boatswain, carpenter—18 shares each.

Fifth Class.—Midshipman, master's assistant pilot, clerk (not passed), master-at-arms, chief gunner's mate, chief boatswain's mate, chief carpenter's mate, chief captain of the forecastle, admiral's coxwain, chief quartermaster, seaman's schoolmaster, ship's steward, ship's cook—10 shares each.

Sixth Class.—Naval cadets, clerk's assistant, captain's coxswain, ship's corporal, quartermaster, gunner's mate, boat-

swain's mate, captain of the forecastle, captain of the afterguard, captain of the hold, captain of the maintop, captain of the foretop, coxswain of the launch, sailmaker, ropemaker, caulker, leading stocker, blacksmith, sergeant of marines, of marine artillery, or of land forces doing duty as marines—Nine shares each.

Seventh Class.—Captain of the mast, captain of the mizentop, yeoman of the signals, coxswain of the barge, coxswain of the pinnace, coxswain of the cutter, second captain of the forecastle, second captain of the maintop, second captain of the foretop, second captain of the afterguard, sailmaker's mate, caulker's mate, musician, cooper, armourer, corporal of marines or of land forces doing duty as marines, bombardier of marine artillery, head krooman—Six shares each.

Eighth Class.—Leading seaman, shipwright, second captain of the hold, able seaman, carpenter's crew, sailmaker's crew, cooper's crew, armourer's crew, yeoman of the store rooms, steward's assistant, ordinary seaman, blacksmith's mate, private and fifer of marines, or of land forces doing duty as marines, gunner of marine artillery, painter, stoker, coal-trimmer, second head krooman, sick berth attendant bandsman, tailor, butcher—Three shares each.

Ninth Class.—Cook's mate, ship's steward's boy, admiral's domestic, superintendent's domestic, admiral's steward and cook, captain's steward and cook, ward-room and gun-room steward and cook, subordinate officers' steward and cook, commander's servant, secretary's servant, second class ordinary seaman, assistant stoker, barber, boy of the first class, first and second class krooman, supernumeraries, except as hereinafter provided, persons borne merely as passengers, and not declining to render assistance on occasion of capture—Two shares each.

Tenth Class.—Boy below first class—One share.

All supernumeraries holding ranks in the service above the ranks or ratings specified in the fifth class of this our proclamation, who have been ordered to do duty in any of our ships or vessels, by the Lord High Admiral, or by our Commissioners for executing the office of Lord High Admiral, by the senior officer of the fleet or squadron, or if none senior, then by the captain or commanding officer of the capturing ship or vessel, if not by special authority employed in higher capacities, shall share according to the rank which they respectively hold in the service; but in all cases to qualify them for so sharing, and not merely as supernumeraries in the ninth class, due notation of their being thus respectively ordered to do duty must have been made on the muster books.

And with respect to supernumeraries of ratings in the service, below the denominations of those specified in the fourth class of this our proclamation, and who at full victuals are engaged in the ordinary duties of the ship, it is our will and pleasure that they shall always share according to the ratings which they bear in the service.

And, in order that our Royal intentions herein may be duly carried into effect, we further direct that when any capture is made from the enemy, the captains or commanding officers of our ships or vessels of war making the same shall transmit, or cause to be transmitted, as soon as may be, to the Secretary to the Admiralty, a true and perfect list of all the officers, seamen, and marines, soldiers, and others, who were actually on board on the occasion, accompanied by a separate list, containing the names of those belonging to the crew who were absent on duty or otherwise at the time, specifying the cause of such absence, each list to contain the quality of the service of each person, together with the respective descriptions of men, taken from the description book of the ship or vessel, and their several ratings, to be subscribed by the captain or commanding officer, and three or four more of the chief officers on board.

And when the list of those actually on board, and the separate list of persons absent, though belonging to the ship or vessel, shall have been verified, on examination with the muster books lodged as official records, the Accountant-General of our Navy shall, upon request, grant to the agent or agents, nominated or appointed by the captors, a certificate that such lists are correct, or have been corrected, as occasion may require, in order that distribution of the prize or other proceeds may be duly made.

And in the event of difficulty arising with respect to any of the regulations hereby ordered, or if any case should occur not herein provided for, or not sufficiently provided for, we are pleased hereby to authorize the Lord High Admiral, or our Commissioners for executing the office of Lord High Admiral, for the time being, to issue such directions thereupon as may appear just and expedient, which directions shall have the same force and effect as if specially provided for in this our Royal Proclamation.

Given at our Court at Buckingham Palace, this twenty-ninth day of March, in the year of our Lord one thousand eight hundred and fifty-four, and in the seventeenth year of our reign.

GOD SAVE THE QUEEN.

III.

CONTRABAND, &c.

The following documents on the subject of trade in Russian goods have been issued by the British government.

Despatch from the Foreign-office, in answer to an application made by the British consul at Riga, who, at the instance of the merchants of that city, had requested information relative to "what respect would be paid by British cruizers, in the event of war, to *boná fide* British property, the produce of Russia, if shipped on board neutral vessels:"—

"Foreign Office, Feb. 16, 1854.

"The Earl of Clarendon has had under his consideration your despatch of the 26th ult., enclosing a copy of a letter from ——, of Riga, requesting to be informed 'what respect would be paid by British cruizers, in the event of war, to *boná fide* British property, the produce of Russia, if shipped on board neutral vessels.' I am to acquaint you, in reply, that property of the description in question—the produce of Russia, and exported therefrom by and on account of a British merchant domiciled and trading there—although purchased before the war, and exported to England, would not be respected by her Majesty's cruizers, unless in pursuance of a licence, or some special instructions from her Majesty to the officers of her navy.

"By the law and practice of nations, a belligerent has a right to consider as enemies all persons who reside in a hostile country, or who maintain commercial establishments therein; whether these people be by birth neutral, allies, enemies, or fellow-subjects, the property of such persons exported from such countries is therefore *res hostium*, and, as such, lawful prize of war: such property will be considered as a prize, although its owner is a native-born subject of the captor's country, and although it may be in transition to that country; and its being laid on board a neutral ship will not protect the property. You will therefore inform whom it may concern that, in the event of war, the property will not be protected by the consular certificate, or by any other document, but will be liable to capture and condemnation as prize."

"Office of Committee of Privy Council for Trade,
Whitehall, March 14, 1854.

"Gentlemen,—In reply to your letter of the 24th of February, requesting to be informed whether, in the event of war between this country and Russia, Russian goods imported from neutral ports would be considered contraband, or would be admissible into England?

"I am directed by the Lords of the Committee of Privy Council for Trade to inform you that, in the event of war, every indirect attempt to carry on trade with the enemy's country will be illegal; but, on the other hand, *bonâ fide* trade, not subject to the objections above stated, will not become illegal merely because the articles which form the subject matter of that trade were originally produced in an enemy's country.

"I am, Gentlemen, your obedient servant,
"J. EMERSON TENNENT.

"Messrs. Martin, Levin, and Adler."

"Foreign Office, 25th March, 1854.

"Sir,—I am directed by the Earl of Clarendon to state to you, that since his Lordship had the pleasure of seeing, on the 20th inst., the deputation of merchants connected with the trade with Russia, his Lordship has further considered the question put to him by the deputation, whether Russian produce brought over the frontier by land to Prussian ports, and shipped thence by British or neutral vessels, will be subject to seizure by her Majesty's cruizers, and to subsequent confiscation in the High Court of Admiralty.

"Lord Clarendon conceives that the question will turn upon the true ownership of, or the interest or risk in, and the destination of, the property which may be seized or captured; and that neither the place of its origin nor the manner of its conveyance to the port whence it was shipped will be decisive, or even in most cases of any real importance.

"Such property, if shipped at neutral risk, or after it has become *bonâ fide* neutral property, will not be liable to condemnation, whatever may be its destination; if it should still remain enemy's property, notwithstanding it is shipped from a neutral port, and in a neutral ship, it will be condemned, whatever may be its destination; if it be British property, or shipped at British risk, or on British account, it will be condemned, if it is proved to be really engaged in a trade with the enemy, but not otherwise. The place of its origin will be

immaterial, and if there has been a *boná fide* and complete transfer of ownership to a neutral (as by purchase in the neutral market), the goods will not be liable to condemnation, notwithstanding they may have come to that neutral market from the enemy's country, either overland or by sea.

"Lord Clarendon has, however, to observe that circumstances of reasonable suspicion will justify capture, although release and not condemnation may follow; and that ships with cargoes of Russian produce may not improbably be considered, under certain circumstances, as liable to capture, even though not liable to condemnation.

"I am, Sir, your most obedient humble servant,

"H. U. ADDINGTON."

The following questions having been addressed to the Earl of Clarendon, on the subject of the foregoing declaration:—

"When war is declared between this country and Russia, will the purchase of Russian produce become illegal, and liable to seizure in its overland transit *viá* Prussia?

"Further,—Will it be lawful for English merchants to purchase Russian produce from a subject of a neutral state; and would such purchases be liable to seizure and confiscation in their transit from such neutral state to this country?

"Is it, or is it not, an invasion of the blockade to receive goods overland *viá* Prussia?"

His Lordship transmitted this reply:—

"Foreign Office, April 12, 1854.

"Sir,—I am directed by the Earl of Clarendon to acknowledge the receipt of your letter of the 11th ult., in which, on behalf of yourself and other parties interested in the Russian trade, you request information on certain points connected with the overland trade with Russia.

"I am to state to you, in reply, that Russian produce brought overland into Prussia, and shipped at a Prussian port for this country, would be liable to seizure, unless it should be *boná fide* neutral property; and that although a British subject cannot trade with an enemy through a neutral, or make a neutral his agent for the purpose of such trade, it will be lawful for an English merchant to purchase Russian produce from a neutral subject residing or trading in a neutral state, and the goods so purchased would be safe in their transit from such neutral state to this country, provided the goods were *boná fide* the property of the neutral at the time of the purchase.

"It will be equally illegal for a British subject to trade with the enemy, whether he sends or receives the goods by sea or overland, and whether a blockade of the enemy's ports does or does not exist.

"I am, Sir, your most obedient humble servant,
"E. HAMMOND.

"Mr. H. W. Elder, 7. Commercial Place,
City Road."

"Treasury Chambers, April 17, 1854.

"Gentlemen,—I am commanded by the Lords Commissioners of her Majesty's Treasury to transmit herewith, for your information and guidance, copy of a letter from the Clerk of the Council in Waiting, and of an order in Council, with reference to the granting of permission for the exportation of articles prohibited by the order of 18th of Feb. last (p. 258).

"I am also to state that their Lordships are pleased to authorize you to permit the articles adverted to in the order in council to be carried coastwise to ports in the United Kingdom, and also to be exported to places abroad situated within the geographical limits described in the order in council, in all cases in which you shall not see reason to suspect the existence of a clandestine intention to transmit the articles to places other than those indicated by the applicants.

"You will observe that a bond is in all cases to be taken from the persons exporting the articles that they shall be landed and entered at the port of destination, and my Lords desire that the exporters may be informed that they will be expected to obtain and transmit to the Commissioners of Customs, within the period named in the bond (which will be fixed by you), certificates of landing and entry, as follows, namely:—

"In the case of the United Kingdom.—From the collector, or other principal officer of Customs.

"In the case of a British possession abroad.—From the Collector of Customs, Governor, or other constituted authority.

"In the case of foreign ports.—From the British Consul or Consular agent, or, if there should be no such functionary, under the hand of the chief magistrate, or other principal national public funtionary there.

"My Lords desire that you will take the requisite steps to secure the due fulfilment of the conditions of the bond, in con-

formity with the regulations above described; and that you will consider these instructions as superseding all former directions which have been given on the subject.

"I am, Gentlemen, your obedient servant,

C. E. TREVELYAN.

"The Commissioners of Customs."

"Council-office, Whitehall, April 13.

"Sir,—I am directed by the Lord President of the Council to transmit to you, for the information of the Lords Commissioners of her Majesty's Treasury, an authenticated copy of an order of the Lords of her Majesty's Most Hon. Privy Council, with reference to the granting of permission for the exportation of articles prohibited by her Majesty's order in Council of the 18th of February last.

"The Lords of the Council are of opinion that, within the geographical limits assigned by this order, permission should still be granted by the Lords Commissioners of her Majesty's Treasury for the exportation of such articles upon taking a bond from the persons exporting such prohibited articles that they shall be landed and entered at the port of destination; but in all other cases application for permission to export such articles must be made to the Lords of the Council, who will consider each case on political grounds, and will transmit to the Lords Commissioners of her Majesty's Treasury an order of the Privy Council, authorizing the officers of her Majesty's Customs to permit such export upon taking a similar bond from the shippers, which bond will be completed in the same manner now in use.

"I have the honour to be, &c.,

"C. C. GREVILLE.

"The Secretary to the Treasury."

The following order, respecting the exportation of articles contraband of war, was published at Hamburg on the 11th April, 1854.

"In consequence of the existing state of war between Turkey, France, and Great Britain on the one hand, and Russia on the other hand, the Senate has determined, for the protection of the interests of the trade and navigation of this city, to make and publish the following enactments:—

"1. The exportation of articles contraband of war to the powers now at war, or to their subjects, is prohibited.

"2. Articles contraband of war consist of arms, ordnance, firearms, and ammunition of every description, but furthermore particularly powder, balls (*kugeln*,) rockets, fusees (*zündhütchen*) and all other material used immediately in war, as also saltpetre, brimstone, and lead.

"3. The transgression of the present order will be followed by a confiscation of the articles contraband of war, and those who are guilty of such transgression, or are accessory to it, will be moreover punished with severity.

"Decreed at Lubeck, at a meeting of the Senate, on the 10th day of April, 1854.

"C. T. Overbeck, Secretary."

"Notice.

"In consequence of the war which has broken out between several of the great European Powers, the Council (*Rath*) feels called upon, as a preliminary, to make the following orders with respect to the intercourse with the harbours and places of the belligerent States:—

"The exportation of all articles deemed contraband of war, or which are understood to be such by the law of nations and the existing Hamburg State treaties, as also the exportation of ammunition, moreover of powder, saltpetre, brimstone, balls (*kugeln*), fusees (*zündhütchen*), and also all description of arms, and generally all such articles as can be immediately used in war, is forbidden from the day of the date of the proclamation equally under the Hamburg and foreign flags or by land to the States of those Powers now engaged in war.

"Whosoever acts in contravention of this order, be it as owner or master of the vessel, or as exporter of the goods, will incur not only the confiscation of the before-named articles, but will also be further punished by a heavy fine and by imprisonment, according to circumstances. In order that a necessary control may be exercised over all exportations to the States at war the articles must be accurately specified, and the superscription, 'merchandise,' or any similar general description, will not be admitted.

"No captain or master of a ship sailing under the Hamburg flag must violate a blockade, or after such (blockade) has been duly notified to him sail through clandestinely; nor must he either carry two sets of ships' papers or bear a foreign flag, so

long as he is in possession of Hamburg ships' papers (*shiffs-passe.*)

"Whosoever may require to know more respecting the orders and notices with reference to navigation and trade of neutrals, as issued by the belligerent States, must address themselves to the Department of Commerce (*Commerce Comptoir*).

"Given in our Assembly of Council, Hamburg, the 10th of April, 1854."

Similar ordinances have been issued by Sweden, 18th April, 1854; Bremen, April 13; Denmark, Holland, Spain, &c.

IV.

At the Court at Windsor, the 15th day of April, 1854; present, the Queen's Most Excellent Majesty in Council.

Whereas her Majesty was graciously pleased, on the 28th day of March last, to issue her royal declaration in the following terms :—

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an ally, is desirous of rendering the war as little onerous as possible to the powers with whom she remains at peace.

"To preserve the commerce of neutrals from all unnecessary obstruction, her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to her by the law of nations.

"It is impossible for her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches, and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbours, or coasts.

"But her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war.

"It is not her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships; and her Majesty further declares that, being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organized forces of the country, it is not her present intention to issue letters of marque for the commissioning of privateers."

Now it is this day ordered, by and with the advice of her Privy Council, that all vessels under a neutral or friendly flag, being neutral or friendly property, shall be permitted to import into any port or place in her Majesty's dominions all goods and merchandise whatsoever, to whomsoever the same may belong, and to export from any port or place in her Majesty's dominions to any port not blockaded any cargo or goods, not being contraband of war, or not requiring a special permission, to whomsoever the same may belong.

And her Majesty is further pleased, by and with the advice of her Privy Council, to order, and it is hereby further ordered, that, save and except only as aforesaid, all the subjects of her Majesty and the subjects or citizens of any neutral or friendly state shall and may, during and notwithstanding the present hostilities with Russia, freely trade with all ports and places wheresoever situate, which shall not be in a state of blockade, save and except that no British vessel shall under any circumstances whatsoever, either under or by virtue of this order, or otherwise, be permitted or empowered to enter or communicate with any port or place which shall belong to or be in the possession or occupation of her Majesty's enemies.

And the Right Hon. the Lords Commissioners of her Majesty's Treasury, the Lords Commissioners of the Admiralty, the Lord Warden of the Cinque Ports, and her Majesty's Principal Secretary of State for War and the Colonies, are to give the necessary directions herein as to them may respectively appertain.

C. C. GREVILLE.

At the Court at Windsor, the 15th day of April, 1854; present, the Queen's Most Excellent Majesty in Council.

Whereas by an order of her Majesty in Council, of the 29th of March last, it was, among other things, ordered, "that any Russian merchant vessel which, prior to the date of this order, shall have sailed from any foreign port, bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded."

And whereas her Majesty, by and with the advice of her said Council, is now pleased to alter and extend such part of the said order, it is hereby ordered, by and with such advice as

aforesaid, as follows—that is to say, that any Russian merchant vessel which, prior to the 15th day of May, 1854, shall have sailed from any port of Russia situated either in or upon the shores or coasts of the Baltic Sea or of the White Sea, bound for any port or place in her Majesty's dominions, shall be permitted to enter such last-mentioned port or place and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

And her Majesty is pleased, by and with the advice aforesaid, further to order, and it is hereby further ordered, that in all other respects her Majesty's aforesaid order in council, of the 29th day of March last, shall be and remain in full force, effect, and operation.

And the Right Hon. the Lords Commissioners of her Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain.

C. C. GREVILLE.

V.

The following are the instructions of the British and French governments for the joint protection of British and French subjects and commerce:—

No. 1.—*Circular addressed to her Majesty's Diplomatic and Consular Agents abroad.*

Foreign Office, Feb. 23, 1854.

Sir,—The communication which has recently been made to you of the correspondence on Eastern affairs which has been laid before both Houses of Parliament, will have shown you that there is every probability of an early commencement of hostilities between Great Britain and France on one side, and Russia on the other. That correspondence will also have shown you that the British and French governments, throughout the difficult and complicated negotiations which have preceded the existing state of affairs, have earnestly and cordially acted together, with a view to avert the calamity of war, and that they are equally prepared to act with the same earnestness and cordiality for the preservation of the Ottoman Empire, if the

Emperor of Russia should still be unwilling to negotiate for peace on fair and reasonable terms.

The time has now arrived when it is incumbent on the two governments to prepare for all the contingencies of war; and among those contingencies it has been impossible for them to overlook the danger to which their subjects and their commerce on the high seas may be exposed by the machinations of their enemy, who, though unable from his own resources materially to injure either, may seek to derive means of offence from countries whose governments take no part in the contest which he has provoked.

But it is a necessary consequence of the strict union and alliance which exists between Great Britain and France, that, in the event of war, their conjoint action should be felt by Russia in all parts of the world; that not only in the Baltic, and in the waters and territory of Turkey, their counsels, their armies, and their fleets, should be united either for offensive or defensive purposes against Russia, but that the same spirit of union should prevail in all quarters of the world, and that whether for offence or defence the civil and military and naval resources of the British and French empires should be directed to the common objects of protecting the subjects and commerce of England and France from Russian aggression, and of depriving the Russian government of the means of inflicting injury on either.

For these reasons her Majesty's government have agreed with that of his Majesty the Emperor of the French to instruct their civil and naval authorities in foreign parts to consider their respective subjects as having an equal claim to protection against Russian hostility: and for this purpose, either singly or in conjunction with each other, to act indifferently for the support and defence of British and French interests. It may be that, in a given locality, one only of the powers is represented by a civil functionary, or by a naval force; but, in such a case, the influence and the power of that one must be exerted as zealously and efficiently for the protection of the subjects and interests of the other as if those subjects and interests were its own.

I have accordingly to instruct you, sir, to act in conformity with this principle. You will consider it your duty to protect, as far as possible, against the consequence of the hostilities in which England and France may shortly be engaged with Russia, the subjects and interests of France equally with those of England; and you will make known without reserve to the French civil and naval authorities, with whom you may have

means of communication, any dangers to which the interests of either country may be exposed, or any opportunities with which you may become acquainted, of inflicting injury on the common enemy.

Instructions to the same effect will be sent by the government of France to its civil and naval authorities in foreign parts, and her Majesty's government concur with that of France in anticipating the most favourable results from this decided manifestation of the intimate union which prevails between them, and which it is their earnest desire should influence their agents in all parts of the world at a moment when they are about to engage in a contest with the Empire of Russia, for an object of such paramount interest to Europe, as the maintenance of the Turkish Empire.—I am, &c.,

(Signed) CLARENDON.

No. 2.—*The Earl of Clarendon to the Lords Commissioners of the Admiralty.*

Foreign Office, Feb. 23, 1854.

My Lords,—I have the honour to acquaint your lordships that her Majesty's Government and that of France have agreed that their civil authorities and naval forces in all parts of the world should co-operate, or if necessary act singly, for the protection of the interests of the subjects and commerce of the two nations, wherever the same may stand in need of assistance, against the hostile machinations of Russia.

I have accordingly addressed to her Majesty's diplomatic and consular agents abroad the instruction of which I inclose a copy, and I am to signify to your lordships the Queen's commands that an instruction to the same effect be forthwith issued by your lordships for the direction of her Majesty's naval forces in all parts of the world. I am, &c.,

(Signed) CLARENDON.

No. 3.—*Circular addressed to Her Majesty's Naval Commanders-in-Chief on Foreign Stations.*

By the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland.

The Earl of Clarendon, her Majesty's Principal Secretary of State for Foreign Affairs, having informed us that her Majesty's Government and that of France have agreed that their

civil authorities and naval forces in all parts of the world should co-operate, or if necessary act singly, for the protection of the interests of the subjects and commerce of the two nations, whenever the same may stand in need of assistance, against the hostile machinations of Russia; and Lord Clarendon having further signified the Queen's commands that an instruction to that effect should be issued for the direction of her Majesty's naval forces in all parts of the world; we transmit to you herewith a copy of Lord Clarendon's letter, together with a copy of a circular addressed by his lordship to her Majesty's diplomatic and consular agents abroad; and we hereby require and direct you to conform yourself in all respects to the views and instructions of her Majesty's government as expressed in Lord Clarendon's letter, and in the circular in question.

We further acquaint you that a similar instruction has been addressed by the French government to the naval forces of France.

We further require and direct you to take the earliest opportunity, after receipt of this order, of communicating in the most friendly manner with the officer in command of the French naval forces on your station, with the view of giving the fullest and speediest effect to the intentions of her Majesty's government and that of France.

Given under our hands the 24th February, 1854.

(Signed) J. R. G. Graham.
Hyde Parker.

No. 4.—*Circular addressed to all the Governors of Her Majesty's Colonies.*

Downing-street, Feb. 24, 1854.

My Lord,—I transmit herewith, for your lordship's information, copy of a circular instruction, which has been addressed to her Majesty's diplomatic and consular agents abroad, directing them, in conformity with an agreement made by her Majesty's government with that of France, to afford protection to French subjects and commerce.

Instructions to the same effect will be forthwith issued to her Majesty's naval officers in all parts of the world.

I have to direct you to conduct yourself in the exercise of your powers as governor of ————————, in accordance with these instructions, so far as they are applicable to your office, to impress on all the local authorities under your superin-

tendence the duty of affording similar protection to French subjects and commerce, and of co-operating for that purpose with her Majesty's naval authorities; and to report to me, without delay, any measures which you may have deemed it expedient to take in reference to these instructions.—I have, &c. (Signed) NEWCASTLE.

No. 5.—*Count Walewski to the Earl of Clarendon.*

(Translation.)

London, February 24, 1854.

The undersigned, Ambassador of his Majesty the Emperor of the French, has been directed by his government to transmit herewith to his Excellency the Earl of Clarendon, her Britannic Majesty's Principal Secretary of State for Foreign Affairs, a copy of the instructions addressed by the government of his Imperial Majesty to all the diplomatic and consular agents of France, as also to the general officers and others commanding at sea, relative to the mutual protection to be exercised by the agents and by the naval officers of each of the two nations over the subjects and commerce of the other.

The undersigned, in conclusion, with reference to the verbal explanations which he has had the honour to exchange upon this subject with his Excellency the Earl of Clarendon, feels it to be his duty to confine himself to place upon record here the object which the two governments have proposed to themselves on this occasion, which is not only to insure complete security for their subjects and ships in every latitude, but also to make more manifest the great fact of their alliance, by communicating to their agents in all parts of the globe the spirit which animates the two cabinets.—The undersigned, &c.

(Signed) A. WALEWSKI.

Inclosure 1 in No. 5.

Circular addressed to the French diplomatic and consular agents abroad.

(Translation.)

Paris, February, 1854.

Sir,—Forced to admit the possibility of hostilities between themselves and Russia, the government of his Imperial Majesty, and that of her Britannic Majesty, have thought that the alliance which they have contracted, in sight of a common

danger, ought to cover all those interests which the consequences of the war may affect or place in jeopardy. Whatever may be the extent of the resources which each of them has at its disposal, especially by sea, they have to take into account unexpected contingencies.

It may chance, if war breaks out, that in localities where the naval forces of each of them may not be constantly present, occurrences may be produced where their fellow-countrymen and their commercial flag may not have, at the necessary moment, all the support which will be indispensable for their security. The two Governments need only to be impressed with the spirit which governs their present relations to find the means to provide for such contingencies; and they recognise those means in the adoption of a mutual system of protection, embracing those interests which are spread over every part of the globe. The diplomatic and commercial agents, together with the commanders of the naval forces of both countries in every part of the globe, will then consider it to be their duty to give their support to the subjects and commerce of the other in all supposable cases in which they may be menaced by the common enemy.

You will, therefore, sir, look upon the subjects and ships of England in your locality, in such cases, as having the same right as the ships and subjects of France to all the assistance which lies in your power, and you will communicate this injunction to the naval authorities of his Imperial Majesty who may be in a position to join in the measures which events resulting from a state of war may appear to you to demand. The agents and naval authorities of her Britannic Majesty will receive identical instructions, and thus the subjects and commerce of the two nations may rely upon reciprocal protection from the consuls and ships of the two powers.

You will understand, sir, that I do not seek to determine by anticipation all the cases which may require your intervention. It is for you to direct yourself, by your own judgment, in the application of the principle which is destined to serve as the rule of your conduct.

The two governments hold it of much less value to lay down with precision the circumstances and the forms in which this protection is to be exercised, than to mark the character which it should assume. But in giving to the world this fresh evidence of the unity of their views, and of the sincerity of their alliance, they are persuaded that, in order to insure for this common measure every desirable efficacy, their agents have

only to be thoroughly imbued with the spirit of solid union which has dictated this measure to the two cabinets.

Receive, &c.

(Signed) DROUYN DE LHUYS.

Inclosure 2 in No. 5.

Instructions of the Minister of Marine and the Colonies to the General, Superior, and other Officers commanding at Sea.

(Translation.)

Paris, February, 1854.

Gentlemen,—My despatch of the 18th of February has specially called your attention to the grave complications to which the Eastern question has given rise in Europe. The negotiations entered into in order to produce a specific solution of the differences which have arisen between Russia and Turkey have not produced any result, and everything tends to the belief that further efforts will be equally useless.

England and France have resolved to protect the Ottoman empire, and to oppose, even by force, the aggrandising projects of Russia. These two great nations are intimately united in their political course, and have interchanged the most positive assurances of their alliance. Their squadrons are cruising together in the Black Sea, and reciprocally extend to each other the most effectual support; the two governments having agreed to one common political course, have equally agreed upon all the means of carrying it into effect.

This alliance on the part of France and England must not be confined to the seas of Europe. The government of his Imperial Majesty and that of the Queen of Great Britain desire that the same union, the same agreement, shall exist in all latitudes. The naval forces of England and France must, therefore, give to each other a mutual support in every region, however distant.

Immediately upon the receipt of these instructions, you will take care to place yourself in communication with the commanders of stations or vessels of Great Britain.

You must, in concert with them, adopt such measures as may be necessary to protect the interests, the power, or the honour of the flag of the two friendly nations. You will, in this sense, give to each other mutual assistance, whether it be in an attack on the enemy, when hostilities have commenced, or when a declaration of war shall have been made, or whether you may from this moment be compelled to defend against attack.

You are to give protection to the merchant shipping of Great Britain, on the same grounds as English ships of war will assist and protect the commercial vessels of our nation.

In one word, the two governments of France and England being desirous that their naval forces shall act as if they belonged to one and the same nation, I am sure that, in so far as you are concerned, you will never lose sight of this rule for your conduct, and that you will know how to enforce it in a manner to cement still further, if possible, the intimate union between the two countries.

So long as hostilities between France and England on one side, and Russia on the other, shall not have commenced, or that a declaration of war shall not have been made, you will avoid aggressive measures, and act upon the defensive.

I shall take care, when the proper time arrives, to forward to you the necessary instructions for attack.—Receive, &c.

(Signed) Ducos.

EMBARGO AND REPRISALS.

At the Court at Buckingham Palace, the 29th day of March, 1854,

Present—The Queen's Most Excellent Majesty in Council.

It is this day ordered by her Majesty, by and with the advice of her Privy Council, that no ships or vessels belonging to any of her Majesty's subjects be permitted to enter and clear out for any of the ports of Russia until further order: and her Majesty is further pleased to order that a general embargo or stop be made of all Russian ships and vessels whatsoever, now within, or which shall hereafter come into, any of the ports, harbours, or roads, within any of her Majesty's dominions, together with all persons and effects on board the said ships or vessels; provided, always, that nothing herein contained shall extend to any ships or vessels specified or comprised in a certain Order of her Majesty in Council, dated this twenty-ninth day of March, for exempting from capture or detention Russian vessels under special circumstances; her Majesty is pleased further to order, and it is hereby ordered, that the utmost care be taken for the preservation of all and every part of the cargoes on board any of the said ships or vessels, so that no damage or embezzlement whatever be sustained; and the Right Hon. the Lords Commissioners of her Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain.

C. C. Greville.

At the Court of Buckingham Palace, the 7th day of April, 1854; present, the Queen's most Excellent Majesty in Council.

Her Majesty being compelled to declare war against his Imperial Majesty the Emperor of all the Russias, and being desirous to lessen as much as possible the evils thereof, is pleased, by and with the advice of her Privy Council, to order, and it is hereby ordered, that Russian merchant vessels which, at the time of the publication of this order, shall be in any ports or places in her Majesty's Indian territories, under the government of the East India Company, or within any of her Majesty's foreign or colonial possessions, shall be allowed 30 days from the time of the publication of this order in such Indian territories, or foreign or colonial possessions, for loading their cargoes and departing from such ports or places; and that such Russian merchant vessels, if met at sea by any of her Majesty's ships, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term. Provided that nothing herein contained shall extend, or be taken to extend, to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian government.

And it is hereby further ordered by her Majesty, by and with the advice of her Privy Council as aforesaid, that any Russian merchant vessel which, prior to the 29th day of March now last past, shall have sailed from any foreign port, bound for any port or place in any of her Majesty's Indian territories, or foreign or colonial possessions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

And the Right Hon. the Lords Commissioners of her Majesty's Treasury, the Lords Commissioners of the Admiralty, and her Majesty's principal Secretary of State for War and the Colonies, the Right Hon. the Commissioners for the Affairs of India, and all governors, officers, and authorities, whom it may concern, in her Majesty's East Indian, foreign, and colonial possessions, are to give the necessary directions herein as to them may respectively appertain. C. C. GREVILLE.

At the Court at Buckingham Palace, the 29th day of March, 1854,

Present—The Queen's Most Excellent Majesty in Council.

Her Majesty having determined to afford active assistance to her ally, his Highness the Sultan of the Ottoman empire, for the protection of his dominions against the encroachments and unprovoked aggression of his Imperial Majesty the Emperor of all the Russias, her Majesty, therefore, is pleased, by and with the advice of her Privy Council, to order, and it is hereby ordered, that general reprisals be granted against the ships, vessels and goods of the Emperor of all the Russias, and of his subjects or others inhabiting within any of his countries, territories, or dominions, so that her Majesty's fleets and ships shall and may lawfully seize all ships, vessels and goods belonging to the Emperor of all the Russias or his subjects, or others inhabiting within any of his countries, territories, or dominions, and bring the same to judgment in such Courts of Admiralty within her Majesty's dominions, possessions, or colonies, as shall be duly commissioned to take cognizance thereof. And to that end her Majesty's Advocate-General, with the Advocate of her Majesty in her Office of Admiralty, are forthwith to prepare the draft of a commission, and present the same to her Majesty at this Board, authorizing the Commissioners for executing the office of Lord High Admiral to will and require the High Court of Admiralty of England, and the Lieutenant and Judge of the said Court, his Surrogate or Surrogates, as also the several Courts of Admiralty within her Majesty's dominions, which shall be duly commissionated to take cognizance of, and judicially proceed upon, all and all manner of captures, seizures, prizes and reprisals of all ships, vessels and goods, that are or shall be taken, and to hear and determine the same; and according to the course of Admiralty, and the law of nations, to adjudge and condemn all such ships, vessels and goods as shall belong to the Emperor of all the Russias or his subjects, or to any others inhabiting within any of his countries, territories, or dominions; and they are likewise to prepare and lay before her Majesty, at this Board, a draft of such instructions as may be proper to be sent to the said several Courts of Admiralty in her Majesty's dominions, possessions and colonies, for their guidance therein.

From the Court at Buckingham Palace, this 29th day of March, 1854.

FITTING OUT SHIPS FOR THE ENEMY.

BY THE QUEEN.—A PROCLAMATION.

Victoria, R.—Whereas, by an Act of Parliament, passed in the fifty-ninth year of the reign of his late Majesty King George the Third, entitled "An Act to prevent the enlisting or engagement of his Majesty's subjects to serve in foreign service, and the fitting out or equipping in his Majesty's dominions vessels for warlike purposes without his Majesty's licence;" it is amongst other things enacted, that if any person, within any part of the United Kingdom, or in any part of his Majesty's dominions beyond the seas, shall, without the leave or licence of his Majesty, his heirs, or successors for that purpose first had and obtained, under the sign manual of his Majesty, his heirs, or successors, or signified by order in council, or by proclamation of his Majesty, his heirs or successors, equip, furnish, fit out or arm, or attempt or endeavour to equip, furnish, fit out or arm, or procure to be equipped, furnished, fitted out, or armed, or shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel, with intent, or in order that such ship or vessel shall be employed in the service of any foreign prince, state, or potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising, or assuming to exercise, any powers of government in or over any foreign state, colony, province, or part of any province or people, as a transport or store ship, or with intent to cruise or commit hostilities against any prince, state or potentate, or against the subjects or citizens of any prince, state, or potentate, or against the persons exercising or assuming to exercise the powers of government in any colony, province, or part of any province or country, or against the inhabitants of any foreign colony, province, or part of any province or country with whom his Majesty shall not then be at war; or shall, within the United Kingdom, or any of his Majesty's dominions, or in any settlement, colony, territory, island, or place belonging or subject to his Majesty, issue or deliver any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid, every such person so offending shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, upon any information or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the court in which such offender shall be convicted; and every such ship or vessel, with

the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores, which may belong to or be on board of any such ship or vessel, shall be forfeited: And whereas it has been represented to us that ships and vessels are being built in several places within the United Kingdom, and are being equipped, furnished, and fitted out, especially with steam machinery, with intent that they shall be employed as aforesaid, without our royal leave or licence for that purpose first had or obtained, or signified as aforesaid: We have, therefore, thought fit, by and with the advice of our Privy Council, to issue this our royal proclamation, warning all our subjects against taking part in such proceedings, which we are determined to prevent and repress, and which cannot fail to bring upon the parties engaged in them the punishments which attend the violation of the laws.

Given at our Court at Buckingham Palace, this ninth day of March, in the year of our Lord one thousand eight hundred and fifty-four, and in the seventeenth year of our reign.

GOD SAVE THE QUEEN.

EXPORTATION OF PROHIBITED STORES OF WAR.

At the Council Chamber, Whitehall, April 11, 1854. By the Lords of her Majesty's most Hon. Privy Council.

The Lords of the Council having taken into consideration certain applications for leave to export arms, ammunition, military and naval stores, &c., being articles of which the exportation is prohibited by her Majesty's proclamation of February the 18th, 1854, their Lordships are pleased to order, and it is hereby ordered, that permission should be granted by the Lords Commissioners of her Majesty's Treasury to export the articles so prohibited, to be carried coastwise to ports in the United Kingdom, and likewise to all places in North and South America, except the Russian possessions in North America; to the coast of Africa, west of the Straits of Gibraltar, and round the south and east coast of Africa; to the whole coast of Asia not within the Mediterranean Sea or the Persian Gulf, and not being part of the Russian territories; to the whole of Australia, and to all British colonies within the limits aforesaid, upon taking a bond from the persons exporting such prohibited articles that they shall be landed and entered at the port of destination; and that all further permission to export such

articles to other parts of the world be only granted upon application to the Lords of the Council at this board.

TRADE WITH RUSSIA.

At the Council Chamber, Whitehall, the 24th day of April, 1854,

By the Lords of her Majesty's Most Honourable Privy Council.

The Lords of the Council, having taken into consideration certain applications for leave to export various articles, of which the exportation is prohibited by her Majesty's Proclamation of the 18th of February, 1854, are pleased to order, and it is hereby ordered, that the officers of her Majesty's Customs do not hereafter prevent the export of any articles except only—

Gunpowder, Saltpetre, and Brimstone,

Arms and Ammunition,

Marine Engines and Boilers, and the component parts thereof.

And that such last-named articles be prohibited from export, only when destined to any place in Europe north of Dunkirk or to any place in the Mediterranean Sea east of Malta; and that the officers of her Majesty's Customs do permit the export of the said enumerated articles to any other part of the world, upon taking, from the persons exporting the same, a bond that they shall be landed and entered at the port of destination.

Whereof the Lords Commissioners of her Majesty's Treasury, and officers of her Majesty's Customs, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

C. C. GREVILLE.

RIGHT OF SEARCH.—IMPRESSMENT OF SEAMEN OUT OF AMERICAN SHIPS.

A convention has just been concluded between the British and American governments, by which important reservations are made with respect to the right of search, as far as American vessels are concerned, and under which the claim, heretofore insisted upon by this country, to impress British subjects out of American vessels, has been relinquished; the United States, on their part, pledging themselves to observe strict neutrality and non-interference in the contest between the Western powers and Russia. The text of the convention has not yet (26th April) been officially made public.

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